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NO. 95-1352

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GARY EDWARDS and TANA WOOD,

Petitioners,

v.

JERRY B. BALISOK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Heck v. Humphrey*, 512 U.S. ___, 114 S.Ct. 2364 (1994) this Court held that habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of confinement and that a prisoner may not bring an action for damages under 42 U.S.C. § 1983 if it would necessarily imply the invalidity of the prisoner's conviction or sentence.

Does this Court's ruling in *Heck v. Humphrey* bar a § 1983 action brought by a prisoner challenging prison disciplinary procedures under the Due Process Clause that would necessarily imply the invalidity of the prisoner's loss of good time?

TABLE OF CONTENTS

I. OPINIONS BELOW 1

II. JURISDICTION 2

III. STATUTORY PROVISIONS 2

IV. STATEMENT OF THE CASE 3

A. The State Prison Disciplinary Proceeding 3

B. Proceedings Below 4

V. REASONS FOR GRANTING THE WRIT 9

A. This Case Presents an Important Question Left Unresolved in *Heck v. Humphrey*. 9

B. There is a Continuing Conflict Between *Preiser v. Rodriguez* and *Wolff v. McDonnell*. 13

C. There is a Conflict Among the Federal Circuits. . 17

D. This Case is Important Because it Concerns a Source of Frequent Litigation that Involves a Substantial State Interest. 21

VI. CONCLUSION 23

TABLE OF AUTHORITIES

Cases — Page

Afroyim v. Rusk,
387 U.S. 253 (1967) 17

Armento-Bey v. Harper,
68 F.3d 215 (8th Cir. 1995) 18

Best v. Kelly,
39 F.3d 328 (D.C. Cir. 1994) 20

Bowen v. Massachusetts,
487 U.S. 879 (1988) 21

Christianson v. Colt Industries Operating Corp.,
486 U.S. 800 (1988) 21

Clark v. Thompson,
960 F.2d 663 (7th Cir. 1992) 16, 18

Coleman v. Coombe,
65 N.Y.2d 777, 482 N.E. 2d 562,
492 N.Y.S.2d 944 (N.Y. 1985) 12

Continental T.V., Inc. v. GTE Sylvania Inc.,
433 U.S. 36 (1977) 17

Ex parte Royall,
117 U.S. 241 (1886) 13

Fulford v. Klein,
529 F.2d 377 (5th Cir. 1976)
adhered to en banc, 550 F.2d 342
(5th Cir. 1977) 23

Gotcher v. Wood,
66 F.3d 1097 (9th Cir. 1995) 8, 9, 18

Gwin v. Snow,
870 F.2d 616, (11th Cir. 1989) 18, 21

Heck v. Humphrey,
512 U.S. ___, 114 S. Ct. 2364 (1994) 6, 8-13, 15, 22

In re Hunter,
43 Wn. App. 174, 715 P.2d 1146 (1986) 11

In re Reismiller,
101 Wn.2d 291, 678 P.2d 323 (1984) 11

Leonard v. Hammond,
804 F.2d 838 (4th Cir. 1986) 20

Offet v. Solem,
823 F.2d 1256 (8th Cir. 1987) 18-20

Parratt v. Taylor,
451 U.S. 527 (1981) 17

Preiser v. Rodriguez,
411 U.S. 475 (1973) 9, 13-16, 19, 23

Rodriguez v. McGinnis,
451 F.2d 730 (2d Cir. 1971) 14

Rodriguez v. McGinnis,
456 F.2d 79 (2d Cir. 1972) 14

Serio v. Members of Louisiana State Board of Pardons,
821 F.2d 1112 (5th Cir. 1987) 17-19

Shea v. Edwards,
221 Ill. App. 3d 219, 581 N.E. 2d 822,
163 Ill. Dec. 668 (Ill. App. 1991) 11

State v. Balisok,
123 Wn.2d 114, 866 P.2d 631 (1994) 3, 7

Viens v. Daniels,
871 F.2d 1328 (7th Cir. 1989) 20

Wolff v. McDonnell,
418 U.S. 539 (1974) 6, 8, 10, 13-16, 19

Young v. Kenny,
907 F.2d 874 (9th Cir. 1990) 6, 8, 18

Statutes & Regulations

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254(b) 2

42 U.S.C. § 1983 ..... 2, 4, 9, 12, 14,15, 16

Other Authorities

Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*,
37 DePaul L. Rev. 85-88, 118, 121-25 (1988) 17, 22

Wash. Admin. Code § 137-28 3

Washington Rules of Appellate
Procedure 16.9 and 16.11 22

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**PETITION FOR A WRIT OF CERTIORARI
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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I. OPINIONS BELOW

The United States District Court for the Eastern District of Washington entered its Order Denying Defendants' Motion To Dismiss and Staying Action, and certified the case for immediate appeal. App. F. Following timely appeals by all parties, the

United States Court of Appeals for the Ninth Circuit reversed and remanded. App. A. Both decisions are unreported.

II. JURISDICTION

The court of appeals entered its judgment on November 22, 1995. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. STATUTORY PROVISIONS

28 U.S.C. § 2254(b) provides, "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

42 U.S.C. § 1983 provides, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

IV. STATEMENT OF THE CASE

Respondent Jerry Balisok is an inmate in the custody of the Washington State Department of Corrections (DOC), pursuant to a 240 month sentence for attempted murder in the first degree. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). Shortly after his conviction, Mr. Balisok was transferred to the Washington State Penitentiary (WSP), in Walla Walla, Washington. During his stay at WSP, Mr. Balisok became known by the United States District Court for the Eastern District as "an inmate who has filed numerous lawsuits ... [and who] assists other inmates with their legal actions " App. F-3.

A. The State Prison Disciplinary Proceeding

Like all prisons within the DOC, officials at WSP enforce a prison disciplinary code, which sets forth a broad range of prison misconduct. Chapter 137-28 Washington Administrative Code (WAC). Violations of this code can result in a number of sanctions, including a loss of good-time credits.

In August of 1993, Mr. Balisok was notified that he had been charged with violations of the prison's disciplinary code. According to the infraction report, an investigation revealed that Mr. Balisok had threatened to label inmate John Adams as a "snitch" in an effort to blackmail Adams into reporting that an

innocent person had stolen answers to a test from the WSP education department. App. K-1 to K-3.

On August 20, 1993, Mr. Balisok appeared at a prison disciplinary proceeding before Lt. Gary Edwards. Mr. Balisok denied that he was guilty of the rule violations, and claimed that Adams had set him up in order to avoid his own responsibility for the stolen test answers. App. K-1 to K-3, L-1 to L-4. Mr. Balisok also complained that he was unable to present exculpatory evidence. App. K-2.

Lt. Edwards found Mr. Balisok guilty based upon documentation from an investigation, including a written report by a Custody Unit Supervisor. Lt. Edwards recommended that Mr. Balisok receive a sanction which included a loss of 30 days good-time credits. App. K-2 to K-3.

Mr. Balisok appealed the finding and sanction to Petitioner Tana Wood, the WSP superintendent. The appeal was rejected because it exceeded the 2-page limit, and the sanctions were imposed. Mr. Balisok then asked that his appeal be reconsidered. Ms. Wood responded by affirming the disciplinary finding and sanctions. App. H-5, F-3.

B. Proceedings Below

On December 10, 1993, Mr. Balisok filed a civil rights complaint under 42 U.S.C. § 1983 alleging that Petitioners Lt. Gary Edwards and Superintendent Tana Wood violated his due

process rights at a prison disciplinary hearing which resulted in the loss of 30 days good-time credits. App. H. In his original complaint, Mr. Balisok alleged that Petitioner Edwards failed to admit and consider exculpatory witness statements, and failed to provide a written report specifying the documents and testimony on which the disciplinary sanction was based. Mr. Balisok also alleged that Petitioner Wood violated his rights when she refused to reverse the unconstitutional disciplinary finding, remove the false infractions from his record, and restore his good-time credits. App. H-4, H-7 to H-24.

For relief, Mr. Balisok requested: (1) a declaratory judgment that Petitioner Edward's decision to deprive Mr. Balisok of 30 days good-time credits deprived him of liberty without due process; (2) a declaratory judgment that Petitioner Wood's refusal to reverse the disciplinary decision and remove the infractions violated his right to due process; (3) an injunction mandating removal of the infractions from his record and all residual effects stemming therefrom; and (4) compensatory and punitive damages in the amount of $80,000. App. H-24 to H-34.

On March 23, 1994, the Petitioners moved to stay the litigation pending Mr. Balisok's exhaustion of his habeas corpus

remedies.[1] The District Court stayed the motion to stay, anticipating this Court's decision in *Heck v. Humphrey*, 512 U.S. ___, 114 S. Ct. 2364 (1994). App. E. On June 24, 1994, this Court decided *Heck* and ruled habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of confinement and that a prisoner may not bring a § 1983 action for damages, if judgment for the prisoner would necessarily imply the invalidity of his conviction or sentence.

This Court distinguished its earlier decision in *Wolff v. McDonnell*, 418 U.S. 539 (1974) which held that a prisoner's class action claim for damages was properly before the district court under § 1983 because it required a determination of the validity of procedures employed for imposing sanctions. The *Heck* Court said of *Wolff*:

> [*Wolff*] recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result (*i.e.*, denying good-time credits). Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in *Wolff* did *not* call into question the lawfulness of the plaintiff's continuing confinement.

114 S.Ct. at 2370.

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[1]Prior to *Heck v. Humphrey*, 512 U.S. ___, 114 S. Ct. 2364 (1994), the Ninth Circuit stayed prisoner challenges to disciplinary proceedings involving lost good time pending the prisoner's exhaustion of habeas corpus remedies. *Young v. Kenny*, 907 F.2d 874 (9th Cir. 1990).

As a result of this decision, the Petitioners filed a motion to dismiss Mr. Balisok's complaint.[2] In support of his response, Mr. Balisok filed an amended complaint in which he abandoned the request for good-time credits. App. I. The amended complaint sought relief in the form of a declaration that the procedures employed violated his right to due process, an injunction to prevent future violations, and compensatory and punitive damages for the "harm sustained from the use of unconstitutional procedures." App. I-9 to I-10. Mr. Balisok omitted any reference to facts indicating that he had suffered harm as a result of the alleged unconstitutional procedures employed by Petitioners Edwards and Wood. At the same time, Mr. Balisok explicitly reserved the right to challenge the loss of good-time credits at another time. App. F-4.

On February 6, 1995, the District Court stayed proceedings and certified the *Balisok* case for immediate appeal to the United States Court of Appeals for the Ninth Circuit. App. F-15. Even though Mr. Balisok dropped his claim for good-time credits, the district court concluded that his "due process claim is a challenge to his conviction of an offense at the disciplinary proceeding, which would affect the length of his

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[2]For the purpose of this motion Petitioners assumed that Mr. Balisok had a liberty interest in the good-time credits. Accordingly, that question is not raised in this case. However, it is raised in a companion petition for a writ of certiorari in *Wood v. Gotcher* which will be filed on February 26, 1996.

sentence." App. F-12. The district court reasoned that if "the disciplinary hearing at issue did violate [Mr. Balisok's] due process rights, it would necessarily follow that the resulting sanctions, including the loss of good-time credit, were also unconstitutional and invalid." App. F-11.

Despite this conclusion, the district court did not dismiss Mr. Balisok's action. Instead, it followed *Young v. Kenny*, 907 F.2d 874 (9th Cir. 1990) which held that such damage claims should be stayed pending exhaustion of the prisoner's remedies in state court.

The Ninth Circuit granted both parties' requests to appeal. On November 22, 1995, the Ninth Circuit summarily reversed and remanded, citing its recent decision in *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995).[3] App. A. *Gotcher* also involved a claim that prison disciplinary procedure which resulted in the loss of good-time credits violated the Due Process Clause. The Ninth Circuit held that Mr. Gotcher did not have to exhaust his state and federal habeas corpus remedies because he was challenging disciplinary procedures. The court relied on discussion of *Wolff* in *Heck* stating:

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[3]The state defendants in *Gotcher v. Wood* intend to seek review of this decision. A companion petition for a writ of certiorari will be filed in *Wood v. Gotcher* on February 26, 1996. The Ninth Circuit's opinions in *Gotcher* is included as Appendix M.

> Gotcher's good conduct time credit claim is similar to the claim in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). In *Heck*, the Court expressly distinguished *Wolff*, noting that *Wolff* challenged the *procedure* by which the inmate was denied good-time credits. *Wolff*, like this case, involved a claim for using the wrong procedure, not for reaching the wrong result (i.e., the denial of good time credits). . . . Likewise, Gotcher's case does not call into question the lawfulness of his continuing confinement and is not barred by *Heck*.

66 F.3d at 1099, App. M-7.

The Ninth Circuit focused exclusively on the relief sought in Mr. Balisok's amended complaint. It did not analyze Mr. Balisok's claims to determine if they would call into question his loss of good-time credits. Instead, the court simply assumed that a prison disciplinary procedure that violated the Due Process Clause would never call into question the denial of good-time credits.

V. REASONS FOR GRANTING THE WRIT

A. This Case Presents an Important Question Left Unresolved in *Heck v. Humphrey*.

In *Preiser v. Rodriguez*, 411 U.S. 475 (1973) this Court held that habeas corpus which includes the requirement to exhaust state remedies is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement even though such a claim may come within the literal terms of 42 U.S.C. § 1983. Left unresolved was whether a prisoner

could bring a § 1983 action for monetary damages instead of an action for immediate or speedier release. In *Heck* the Court addressed this question and ruled that a prisoner may not bring a § 1983 action for damages if a judgment in the prisoner's favor would "necessarily imply the invalidity of his conviction or sentence". 114 S.Ct. at 2372. A § 1983 brought by a prisoner is only proper if

> the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff[.]

Id.

The question left unresolved in *Heck* is whether this rule also applies to due process challenges to prison disciplinary procedures. *Heck* concerned a challenge to the prisoner's conviction rather that prison disciplinary procedures. Nevertheless, *Heck* discussed procedural challenges in its discussion of *Wolff* stating:

> [*Wolff*] recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result (*i.e.*, denying good-time credits). Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in *Wolff* did *not* call into question the lawfulness of the plaintiff's continuing confinement.

114 S.Ct. at 2370.

Based on this language in *Heck* the Ninth Circuit ruled that Mr. Balisok's § 1983 action was proper simply because it was a challenge to procedure. The court did not determine whether Mr. Balisok's action, if successful, would not demonstrate the invalidity of his loss of good time. App. A-2. Instead the Ninth Circuit simply assumed that any challenge to prison disciplinary procedure would not call into question the loss of Mr. Balisok's good-time credits. This assumption is incorrect. Constitutional defects in prison disciplinary procedures do result in the invalidity of disciplinary sanctions.

In Washington, the appellate courts have exercised their power to reverse the decision and sanctions of disciplinary hearing officers and order new hearings when the courts determined that the procedures followed by prison officials did not pass constitutional muster. See, e.g., *In re Reismiller*, 101 Wn.2d 291, 298, 678 P.2d 323 (1984)("Thus, the committee's finding is reversed and the cause remanded with directions that the superintendent grant a new disciplinary proceeding consistent with the requirements of this opinion."); *In re Hunter*, 43 Wn. App. 174, 177, 715 P.2d 1146 (1986)("But even lofty goals cannot excuse the entire lack of due process and the arbitrary manner in which these hearings were conducted with the resultant punishments. The findings and sanctions imposed against each petitioner must be set aside."). *See also Shea v.*

Edwards, 221 Ill. App. 3d 219, 581 N.E.2d 822, 823, 163 Ill. Dec. 668 (Ill. App. 1991); *Coleman v. Coombe*, 65 N.Y.2d 777, 482 N.E.2d 562, 492 N.Y.S.2d 944 (N.Y. 1985).

In this case Mr. Balisok claims that he was denied the opportunity to present exculpatory evidence in his defense. If this claim were true it would be necessary to invalidate his loss of good-time credits. Both Mr. Balisok and the district court recognized this result. Mr. Balisok's original complaint sought restoration of his good-time credits. The district court stated: "If the court should find that the disciplinary hearing at issue did violate Petitioner's due process rights, it would necessarily follow that the resulting sanctions, including the loss of good-time credit, were also unconstitutional and invalid." App. F-11.

It is very important for the court to decide whether the rule laid down in *Heck* applies to challenges to prison disciplinary procedures. The Ninth Circuit has essentially adopted a *per se* rule that any challenge to prison disciplinary procedures is proper under § 1983, regardless of whether it demonstrates the invalidity of disciplinary sanctions such as the loss of good-time credits.

The Ninth Circuit's interpretation creates a substantial loophole in the *Heck* rule. This case is a perfect example. Mr. Balisok initially sought restoration of his good-time credits. After *Heck* was decided, he simply dropped that claim in an

amended complaint, although he specifically reserved the right to renew that claim at a later date. App. I. Thus, if Mr. Balisok's § 1983 action is successful, he can use that decision to restore his good-time credits.

B. There is a Continuing Conflict Between *Preiser v. Rodriguez* and *Wolff v. McDonnell*.

Conflict and confusion continue in the federal courts about how to handle § 1983 actions challenging prison disciplinary procedures and the *Heck*'s discussion of *Wolff* has done nothing to resolve this conflict and confusion. The tension between this Court's decisions in *Preiser* and *Wolff* is the source of this conflict and confusion. In *Preiser*, the Court ruled that habeas corpus is the exclusive remedy for a state prisoner to challenge the fact or duration of confinement. The Court emphasized that the exhaustion requirement in federal habeas actions is rooted in important considerations of federal-state comity that were found to be fundamental by this Court long before Congress codified it in 1948. 411 U.S. at 490-491; *Ex parte Royall*, 117 U.S. 241, 251 (1886). The exhaustion requirement is particularly important in cases where a prisoner challenges a prison disciplinary proceeding. 411 U.S. at 492.

Preiser also established the principle that prisoners must not be allowed to manipulate their pleadings in an effort to deprive the states of their "first opportunity to correct the errors

made in the internal administration of their prisons." *Id.*, at 492. Mindful of the incentive for prisoners to attempt to circumvent the exhaustion requirement, *Preiser* refused to allow the comity interests served by exhaustion to be defeated "by the simple expedient of putting a different label on [the] pleadings."[4] *Id.*, at 489-90.

Shortly after *Preiser*, this Court decided *Wolff*, which involved prisoners in a class action seeking both injunctive relief and monetary damages pursuant to § 1983. 418 U.S. at 554. The class of prisoners challenged the constitutionality of an undisputed set of procedural regulations governing inmate discipline including loss of good-time credits, not the procedures applied in a specific disciplinary proceeding.

The threshold question in *Wolff* was whether, under *Preiser*, the validity of the procedures for depriving prisoners of good-time credits could be considered. In resolving this question, the Court relied on *dicta* in *Preiser*, and held that the plaintiffs in the class action could challenge the prison's

[4]This concern was also noted by the Second Circuit before review was granted. In *Rodriguez v. McGinnis*, 451 F.2d 730, 731 (2d Cir. 1971), the court recognized that "[s]tate prisoners are increasingly resorting to the Civil Rights statutes in order to circumvent the [exhaustion] requirements of the [habeas corpus statute]." *See also Rodriguez v. McGinnis*, 456 F.2d 79, 84 (2d Cir. 1972) (en banc) (Mansfield, J., concurring) ("state prisoners' *habeas corpus* petitions have been dressed up in a § 1983 suit of clothes".).

established procedures for revoking good-time credits in their § 1983 action. *Wolff* stated:

> [A] declaratory judgment as a predicate to a damages award would not be barred by *Preiser*, and because under that case only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.

418 U.S. at 555.

Heck did not resolve the tension between *Preiser* and *Wolff*. *Heck* rejected the dicta in *Preiser* relied on by *Wolff* as "an unreliable, if not an unintelligible, guide". 114 S.Ct. at 2370. However, in one respect, the Court seemed to endorse the result in *Wolff* stating:

> [*Wolff*] recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result (*i.e.*, denying good-time credits). Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in *Wolff* did *not* call into question the lawfulness of the plaintiff's continuing confinement.

Id. On the other hand, a *per se* rule that challenges to prison disciplinary procedures can be brought pursuant to § 1983 is totally inconsistent with the Court's reasoning in *Heck*. Thus, the question remains: Can a prisoner bring a challenge to the prison disciplinary procedures that result in the loss of good-time

credits under § 1983 regardless of whether it demonstrates the invalidity of disciplinary sanctions such as loss of good-time credits?

The issue has caused substantial conflict and confusion in the federal courts. In *Clark v. Thompson*, 960 F.2d 663, 664 (7th Cir. 1992), Judge Easterbrook described the problem:

> Ever since *Preiser* and *Wolff*, we have struggled with the distinction between § 2254 and 42 U.S.C. § 1983. .... Since *[Wolff]* it has been difficult to know how to classify suits that purport to be about procedures and conditions of confinement, but that logically entail a shorter duration of confinement if the prisoner wins. This circuit's leading cases ... are not entirely harmonious, among themselves or with decisions in other circuits. Both sides ask us to tidy up, although they disagree about which cases we should overrule and which extend. As the source of the problem lies elsewhere, in the tension between *Preiser* and *Wolff* rather than in our failure to tread a path already blazed, we doubt that more words would bring greater clarity.

(Emphasis added, citations omitted). The Fifth Circuit has also cited to the tension between *Preiser* and *Wolff* as a cause of "struggle" among the circuits:

> The Supreme Court cases do not, therefore, make it easy to separate claims that challenge the "fact or duration" of confinement and claims that challenge procedures having some effect on release decisions. ... Defining the precise contours of the boundaries between *Preiser* and *Wolff* consequently has proved to be an elusive goal. Without additional guidance from the Supreme Court, the circuit courts have

> struggled to establish clear standards for determining how the rules set forth by *Preiser* and *Wolff* should be applied to § 1983 claims that would, through the effects of res judicata and collateral estoppel, call directly into question the constitutionality of state court or administrative decisions affecting release decisions even though the plaintiff does not explicitly seek release from custody.

Serio v. Members of Louisiana State Board of Pardons, 821 F.2d 1112, 1116 (5th Cir. 1987) (emphasis added). *See also* Schwartz, The *Preiser* Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners, 37 DePaul L. Rev. 85-88, 118, 121-25 (1988) (emphasis supplied).[5]

C. There is a Conflict Among the Federal Circuits.

In this case, the Ninth Circuit concluded that a prisoner's challenge to a specific disciplinary hearing will never "call into question" the resulting loss of good time as long as the prisoner indicates that he is only challenging the procedures, and not the

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[5]This Court has recognized the appropriateness of certiorari to revisit a precedent that has become "a source of controversy and confusion" *Afroyim v. Rusk*, 387 U.S. 253, 255 (1967), or "the subject of continuing controversy and confusion," and where "federal courts confronted with analogous [facts] have sought to limit its reach." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47-48 (1977). Similarly, certiorari was appropriate in *Parratt v. Taylor*, 451 U.S. 527, 533 (1981) where the Court noted that two prior decisions "have not aided the various Courts of Appeals and District Courts in their struggle to determine the correct manner in which to analyze claims such as the present one".

result, of the hearing. App. A-2. In reaching this conclusion, the Ninth Circuit looks solely to the relief sought in the prisoner's complaint. Under this approach, it is irrelevant that the prisoner sought lost good-time credits in his original complaint, App. H-28, H-32 to H-33, or that the prisoner expressly reserved the right to challenge the lost good-time credits in state court after the federal court rules that this was a deprivation without due process. App. F-4.

This approach directly conflicts with that taken by Fifth and Eighth Circuits.[6] *Serio*, 821 F.2d 1112 ; *Offet v. Solem*, 823 F.2d 1256 (8th Cir. 1987); *see Armento-Bey v. Harper*, 68 F.3d 215, 216 (8th Cir. 1995) (Bowman, dissenting). Under the analysis of these cases, Mr. Balisok's challenge to the prison disciplinary proceedings would have been dismissed or stayed pending his exhaustion of state court remedies.

In *Serio*, the Fifth Circuit reviewed a prisoner's § 1983 claim against members of the Louisiana State Board of Pardons. Although the case dealt with parole procedures, Serio's claim was notably similar to Mr. Balisok's claim. Serio alleged that

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[6]This issue has also led to a considerable divisiveness within the circuits. *Clark v. Thompson*, 960 F.2d 663, 664 (7th Cir. 1992); *Armento-Bey v. Harper*, 68 F.3d 215, 216 (8th Cir. 1995)(Judge Bowman, who authored *Offet*, dissents to a per curiam decision joined by Judge Arnold, who had dissented in Offet); *Gwin v. Snow*, 870 F.2d 616, 623, 626-27 (11th Cir. 1989) (the court reluctantly accepts a rule "despite its conflict with Supreme Court precedent"). Compare *Young v. Kenny*, 907 F.2d 874 (9th Cir. 1990) with *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995).

the Board denied his parole, at least in part, because of his litigiousness, and Serio sought a declaratory judgment and order enjoining Board members from repeating the practice in the future. 821 F.2d at 1113. Much like Mr. Balisok, Serio attempted to avoid exhaustion of habeas corpus remedies by insisting that he sought neither a reduction in his sentence nor early release. *Id.*, at 1115.

The Fifth Circuit reviewed *Preiser* and *Wolff* to determine whether Serio's claims had to first be pursued through habeas corpus with its attendant exhaustion requirement. Despite Serio's characterization of his claims as "procedural", the court required him to exhaust his remedies. The court held that a prisoner must exhaust his state habeas remedies before bringing a § 1983 claim that his or her hearing was constitutionally defective. *Id.*, at 1118. The court said it would even apply this rule to cases where the prisoner brings a "broad-based attack", when that attack may, in effect, automatically entitle the specific claimant to an earlier release. *Id.*, at 1119.

In *Offet*, the Eighth Circuit reviewed a prisoner's challenge to rules governing good-time credits. In addition to other relief, Offet sought punitive damages and an injunction prohibiting the prison from withholding future good-time credits under the rules.

In contrast to Mr. Balisok's case, the Eighth Circuit required Offet to exhaust his state court remedies.

> The distinction adopted by some other federal courts between a challenge to the "manner" of applying prison disciplinary sanctions and one challenging the "outcome" of a particular proceeding seems to us no answer to the concerns of federalism that cases such as this one raise.

823 F.2d at 1259 (citations omitted). The court found it "clear that the question whether exhaustion should be required should not be determined solely by reference to the relief the plaintiff requests. Such a facile distinction between habeas and other claims quickly would subvert the policy announced in Preiser", and would deprive the state court system of its first opportunity to address the merits of the underlying constitutional issue. *Id.*, at 1258 (citations omitted).

The Ninth Circuit's decision also appears to conflict with the D.C. and Fourth Circuits. In *Best v. Kelly*, 39 F.3d 328, 330 (D.C. Cir. 1994), the D.C. Circuit required exhaustion of the prisoners' due process challenge to the replacement of a treatment program under which they were entitled to good-time credits. In *Leonard v. Hammond*, 804 F.2d 838, 839 (4th Cir. 1986), the Fourth Circuit required exhaustion in a case where plaintiffs sought to enjoin the future imprisonment (for civil contempt) of indigents who are not first appointed counsel.

Other circuits take a narrower view, focusing solely on the relief sought by the prisoner. *See Viens v. Daniels*, 871 F.2d 1328, 1333 (7th Cir. 1989) (rejecting the Eighth Circuit's approach in *Offet*); *Gwin v. Snow*, 870 F.2d 616, 625-26 (11th Cir. 1989) (refusing to adopt the bright-line rule set forth in *Serio*). These circuits will allow a § 1983 claim to proceed as long as the prisoner claims he is only seeking relief from the procedures, as opposed to the result, of the allegedly unconstitutional hearing.

The federal courts' longstanding conflict and confusion with respect to jurisdiction under § 1983 of challenges to prison disciplinary procedures, which was not resolved in *Heck*, presents a significant question that requires resolution by this Court.

D. This Case is Important Because it Concerns a Source of Frequent Litigation that Involves a Substantial State Interest.

This Court has recognized its review is needed when the case involves jurisdictional questions that are frequently subject to litigation in the federal courts. As Justice Scalia has observed, "[n]othing is more wasteful than litigation about where to litigate". *Bowen v. Massachusetts*, 487 U.S. 879, 930 (1988) (dissenting opinion); *see also Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818-19 (1988). Prison disciplinary cases are frequently subject to litigation because they

lie "at the intersection of the two most fertile sources of federal-court prisoner litigation--the Civil Rights Act of 1871, Rev.Stat. § 1979, as amended, 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254", *Heck*, 114 S. Ct., at 2369, and this intersection is frequently inhabited by numerous *pro se* litigants. *Pro se* litigants may: (1) lack the sophistication to recognize that their claim for good-time credits has been mispled as a civil rights challenge to procedures, or (2) possess the sophistication to draft pleadings designed to circumvent the exhaustion requirement. *See* Schwartz, 37 DePaul L. Rev. at 125-26.

Preiser recognizes that the states have an important interest in initially resolving constitutional claims. If a state prisoner could secure § 1983 review of prison disciplinary procedures that led to an extension of the prisoner's confinement by simply seeking injunctive and declaratory relief, this Court's explicit mandate that state prisoners must exhaust their state court remedies would be rendered meaningless.

This result places form before substance, and potentially frustrates the state's ability to remedy a deprivation of liberty through its own mechanisms for prompt resolutions of such claims. See Washington Rules of Appellate Procedure 16.9 and 16.11 (the State must respond to a claim of unlawful restraint

within 20 days and the Chief Judge must consider the claim promptly).

If the Ninth Circuit's interpretation is correct, then a litigant could get a federal ruling on the merits of an action which affects his release date, along with damages, a prospective injunction, or a declaratory judgment. *See Fulford v. Klein*, 529 F.2d 377 (5th Cir. 1976) *adhered to en banc*, 550 F.2d 342 (5th Cir. 1977). The litigant could then go back into state court armed with the federal court judgment and demand the restoration of lost good time, a rescinded parole date, or other determinations directly affecting his confinement, claiming res judicata or collateral estoppel, or both. A federal court ruling could directly lead to a reversal of the prison disciplinary finding and sanction -- a result that is inconsistent with this Court's ruling in *Preiser*.

Because of the substantial state interests at stake in an area frequently litigated, this Court should definitively decide the issue.

VI. CONCLUSION

The petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED

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February 1996

[FILED]
[November 22, 1995]

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 95-35307
95-35310

D.C. No. CV-93-00416-JLQ

MEMORANDUM*

JERRY B. BALISOK,
Plaintiff-Appellant,
Cross-Appellee,

v.

GARY P. EDWARDS; TANA WOOD,
Defendants-Appellees-
Cross-Appellants,

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, District Judge, Presiding

Submitted November 20, 1995**

Filed November 22, 1995

Before: PREGERSON, NORRIS and REINHARDT, Circuit Judges.

Washington state prisoner Jerry B. Balisok appeals and Washington state prison officials Gary Edwards and Tana Wood cross-appeal the district court's order staying Balisok's 42 U.S.C. § 1983 action. We reverse and remand.

These appeals are governed by our recent decision in Gotcher v. Wood, No. 94-35484, slip op. 12881 (9th Cir. Oct. 4, 1995), in which we held that an inmate's challenge to the procedure by which he was denied good-time credits did not call into question the lawfulness of his continuing confinement and was not barred by Heck v. Humphrey, 114 S. Ct. 2364 (1994). Because Balisok's due process challenges to prison disciplinary procedures were not barred by Heck, see Gotcher, slip op. at 12885-86, we reverse the district court's order staying Balisok's section 1983 action and remand for further proceedings.

REVERSED AND REMANDED.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

[FILED]
[January 26, 1994]

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NO. CS-93-416-JLQ

ORDER TO PROCEED *IN FORMA PAUPERIS*, ORDER DISMISSING ONE ALLEGATION AND ORDER OF SERVICE

JERRY B. BALISOK,

Plaintiff,

v.

GARY EDWARDS and TANA WOOD,

Defendants.

Plaintiff, a prisoner at the Washington State Penitentiary, Walla Walla, Washington, seeks to file *in forma pauperis* a *pro se* civil rights complaint pursuant to 42 U.S.C. § 1983. Because it appears Plaintiff lacks sufficient funds to prosecute this action,

IT IS HEREBY ORDERED that the Clerk shall file the complaint without payment of the filing fee.

PLAINTIFF'S ALLEGATIONS

Mr. Balisok claims the Defendants violated his due process rights because his witness' statements were not admitted at his infraction hearing, it was not noted on the record why

witnesses were not called or statements given, he was denied a staff advisor and Defendant Edwards failed to specify in his reasons for finding Plaintiff guilty which reports and what documents he relied on to make the finding. The Plaintiff alleges he requested witness statements from several inmates and an instructor with the community college. He maintains that some of them were not given statements to fill out, and others wrote statements but Defendant Edwards either denied their existence or refused to consider them.

The Plaintiff also alleges he requested a staff advisor because he is allegedly suffering from sensory deprivation psychosis from being in IMU, but Defendant Edwards denied Plaintiff's request. Mr. Balisok asserts he has a liberty interest in having an advisor created by WAC 137-28-097[1] which provides for staff advisors for inmates meeting certain requirements. Plaintiff reports he was found guilty of four major infractions and was sanctioned with ten days isolation, 20 days in segregation, and the loss of 30 days of good-time credits. He alleges he appealed the finding and sanctions, but his appeal was

[1]**WAC 137-28-097. Staff advisors** (1) An inmate *may* have a staff advisor appointed by the hearing officer to prepare for a hearing. The hearing officer shall consider such factors as the literacy, the complexity of the issue and the inmate's overall ability to speak for himself/herself and adequately present his/her case, prior to assigning a staff advisor. *The assignment of a staff advisor will only be necessary when considering such factors, and should not be construed to mean that a staff advisor must be assigned.* . . . **WAC 137-28-097(1) (1984) (emphasis added).**

not acted upon and was returned for being too long. Plaintiff asserts he refiled his appeal insisting it should be accepted because the two page limit was not mandatory. He claims his resubmitted appeal was not considered by Defendant Wood. Plaintiff prays for declaratory and injunctive relief, and for compensatory and punitive damages.

DISCIPLINARY HEARING DUE PROCESS

The Supreme Court has enumerated the rights to which inmates of state prisons are entitled in disciplinary proceedings as a matter of procedural due process under the Fourteenth Amendment. Where the prisoner is charged with serious misconduct and is penalized with the loss of "good-time" credits or with punitive segregation, the prisoner's rights include (1) advance written notice of the charges against him or her, (2) an opportunity to call witnesses and present documentary evidence, provided that to do so will not jeopardize institutional safety or correctional goals, and (3) a written statement by the factfinder of the evidence relied upon and reasons for the disciplinary action taken. *Wolff v. McDonnell*, 418 U.S. 539, 564-66 (1976).

The findings of a prison disciplinary board which result in the loss of a protected liberty interest must be supported by "some evidence on the record." *Superintendent v. Hill*, 472 U.S. 445, 454 (1985), *Bostic v. Carlson*, 884 F.2d 1267, 1269-70 (9th Cir. 1989). Under the *Hill* analysis the court determines

"whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Hill*, 472 U.S. at 455-56. The record must not be "so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary." *Id.* at 457. This court, however, is not to make its own assessment of the credibility of witnesses or reweigh the evidence. *Id.* at 455.

Among the due process rights afforded prisoners at disciplinary hearings is the right to call witnesses and present evidence unless granting the request would be "unduly hazardous to institutional safety or correctional goals." *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974). The right to call witnesses is subject to the "mutual accommodation between institutional needs and objectives and the provisions of the Constitution . . . ." *Baxter v. Palmigiano*, 425 U.S. 308, 321 (1976). "[P]rison officials maybe required to explain, in a limited manner, the reason why witnesses were not allowed to testify, but that they may do so either by making the explanation a part of the 'administrative record' in the disciplinary proceeding, or by presenting testimony in court if the deprivation of a 'liberty' interest is challenged because of that claimed defect in the hearing." *Ponte v. Real*, 471 U.S. 491, 497 (1985).

The Plaintiff claims he was denied the right to call several of his witnesses and that it was not noted on the record

why his witnesses were not called or given statements. Regarding the denial/refusal to call witnesses without explanation on the record, Plaintiff has alleged facts sufficient to invoke federal subject-matter jurisdiction.

LIBERTY INTERESTS

Liberty interests protected by the Fourteenth Amendment may arise from two sources - the Due Process Clause itself and the laws of the States." *Hewitt v. Helms*, 459 U.S. 460, 466 (1983).

> State law establishes a liberty interest if it places substantive limitations on the exercise of official discretion. *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). The limitations must contain mandatory language requiring specific, substantive predicates. *See Hewitt*, 459 U.S. at 471. (State statute combining mandatory words such as "shall," "will," or "must" with substantive predicates creates protected liberty interest). In essence, "a given action will be taken or avoided only on the existence or nonexistence of specified substantive predicates." *Toussaint [v. McCarthy]*, 801 F.2d [1080] at 1094 [(9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987)].

Smith v. Noonan, 992 F.2d 987, 989 (9th Cir. 1993).

Regarding Plaintiff's other due process allegations, the Constitution does not guarantee the right to appeal the result of an infraction hearing, *Wolff*, 418 U.S. at 564-66. Mr. Balisok argues that he has a state created liberty interest in the appeals process created by WAC 137-28-115. The State of Washington

provides for an infraction hearing appeal process, and the regulation outlining the process arguably creates a liberty interest for the inmate in having his appeal heard. WAC 137-28-115.[2] Thus, Plaintiff has alleged facts sufficient to invoke federal subject-matter jurisdiction.

In addition, the Constitution requires that the inmate receive a written statement from the factfinder of the evidence relied upon and reasons for the disciplinary action taken. *Wolff*, at 564-66. According to Plaintiff's pleading, Defendant Edwards' written summary of his reasons stated "Written rpt and testimony, documents provided." (Civ. Rts. Compl. at 11.) Plaintiff argues that given the volume of documents involved in his infraction, Defendant Edwards' written summary did not sufficiently point out the evidence relied upon for the disciplinary action taken. Plaintiff has alleged facts sufficient to invoke federal subject-matter jurisdiction.

The Constitution does not guarantee that an inmate will be provided with a staff advisor. Plaintiff has not shown that he necessarily qualified for a staff advisor. In any case, however,

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[2]**WAC 137-28-115. Appeal to superintendent** (1) An inmate *may* appeal the decision of the hearing officer to the superintendent by filing a written request for review and his/her reasons therefor with the clerk within twenty-four hours, exclusive of weekends and holidays, after receiving written notice of the decision of the hearing officer. The superintendent may, in his/her discretion, consider appeals filed beyond the twenty-four hour period. WAC 137-28-115(1) (1984) (emphasis added).

WAC provision that allows staff divisors (WAC 137-28-097, see note 1) to be appointed for inmates in need of them does not create a liberty interest for Plaintiff to have one appointed for him (language discretionary not mandatory). Therefore, Plaintiff's due process rights were not violated when a staff advisor was not appointed for him.

DISMISSAL BASED ON 28 U.S.C. § 1915(d)

Plaintiff is proceeding in this action *in forma pauperis* under 28 U.S.C. § 1915(d). *Sua sponte* dismissal of this action prior to service of process is justified only if, under section 1915(d), the complaint is frivolous. *Jackson v. State of Arizona*, 885 F.2d 639 (9th Cir. 1989). A complaint is frivolous within the meaning of section 1915(d) only if it lacks an arguable basis in law or fact. *Id*. This court may dismiss *in forma pauperis* claims which are "based on indisputable meritless legal theories" or whose "factual contentions are clearly baseless." *Id*. (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (such as "claims against which it is clear that the defendants are immune from suit. . .")). also, this court may dismiss "claims of infringement of a legal interest which clearly does not exist." *Id*.

Plaintiff's allegations of due process violations for failure to provide Plaintiff with a staff advisor has no basis in fact. Mr. Balisok has no liberty interest in being appointed a staff advisor to help him through the process. Therefore, Plaintiff's

allegations of a due process violation for failure to appoint a staff advisor has no basis in law or fact. Accordingly,

IT IS ORDERED that Plaintiff's due process allegation regarding Plaintiff's not being provided with a staff advisor is **DISMISSED WITH PREJUDICE.** In addition, because Plaintiff has dropped his allegations against Superintendent Tana Wood, Plaintiff's allegations against Tana Wood are **DISMISSED WITH PREJUDICE.** Regarding the remainder of Plaintiff's due process allegations,

IT IS ORDERED:

1. The United States Marshal, in compliance with Fed. R. Civ. P. 4(c) (2) (c) (ii), shall serve, by First Class Mail, a Notice of Lawsuit and Request for Waiver of Service for Summons and the Complaint and Order Granting Leave to Proceed In Forma Pauperis, upon the above-named Defendants, together with two copies of the Waiver of Service and a return envelope, postage prepaid, addressed to the sender.

2. The clerk shall mail a copy of the complaint to the Attorney General for the State of Washington.

3. Defendants shall file an answer or otherwise respond to the Complaint within forty-five (45) days after service. Failure to so respond may result in entry of a default judgment, pursuant to LR 55.

4. Plaintiff shall serve upon Defendants, or if appearance has been entered by counsel, upon their attorney, a copy of every further pleading or other document submitted for consideration by the Court. He shall include with the original paper to be filed with the Clerk of Court a certificate stating the date a true and correct copy of any document was mailed to the Defendants or to their counsel. Any paper received by a District Judge or Magistrate Judge which has not been filed with the Clerk or which fails to include a certificate of service will be disregarded by the Court. Plaintiff is also advised that throughout this action he must notify the Clerk of the Court regarding any change of address and phone number (at least a message phone). Failure to do so might result in the dismissal of the action if the Court is unable to contact Plaintiff.

IT IS FURTHER ORDERED, that a telephonic scheduling conference between the court, Plaintiff and counsel for Defendants will be held on **April 4, 1994 at 3:00 p.m.** The court will initiate the call. On or before March 28, 1994, officials at the Washington State Penitentiary shall furnish the court with the telephone number at which the court can reach Plaintiff at the time and date of the conference.

On or before March 28, 1994, Plaintiff and counsel for Defendants shall file and serve written status reports with respect to the parties' positions concerning:

1. Service of process on parties not yet served;

2. Jurisdiction and venue;

3. Anticipated motions;

4. Anticipated and remaining discovery, including limitations on discovery.

5. Further proceedings, including setting dates for discovery cutoff, pretrial and trial;

6. Appropriateness of special procedures such as consolidation of actions for discovery or pretrial, reference to a master or magistrate or to arbitration;

7. Modification of the standard pretrial procedure due to the relative simplicity or complexity of the action or proceeding;

8. Anticipated trial time required - if reasonable evaluation is practical;

9. Feasibility of bifurcation or otherwise structuring sequence of the trial;

10. Prospects for settlement;

11. Any other matters that may be conducive to the just, efficient and economical determination of the action or proceeding, including the definition or limitation of issues.

12. In his report, Plaintiff shall list the name, address and expected testimony from each witness he desires the court to subpoena to testify at the trial of this matter.

Plaintiff and counsel for Defendants shall also advise the Clerk whether all parties will consent to trial of this case by a Magistrate Judge and whether, in the event of an appeal, the

appeal will be taken to the Ninth Circuit Court of Appeals. 28 U.S.C. § 636. In the absence of consent by all parties, disclosure as to which consented and which did not will be made only to the clerk.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to Plaintiff and to counsel for Defendants.

DATED this 25th day of January, 1994.

JUSTIN L. QUACKENBUSH
Chief United States District Judge

[FILED]
[March 8, 1994]

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NO. CS-93-416-JLQ

ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION AND ORDER OF SERVICE

JERRY B. BALISOK,

Plaintiff,

v.

GARY EDWARDS and TANA WOOD,

Defendants.

BEFORE THE COURT is Plaintiff's Motion to Clarify (Ct. Rec. 3) which this Court will construe as a Motion for Reconsideration. The motion was considered on February 28, 1994 without oral argument. Plaintiff is proceeding *pro se*, and Defendants have not yet filed an answer in this matter. The Court has reviewed the record and is fully advised in this mater, and **IT IS HEREBY ORDERED** that Plaintiff's Motion for Reconsideration is **GRANTED.** The Court will reconsider and reinstate Plaintiff's allegations against Defendant Tana Wood.

PLAINTIFF'S ALLEGATIONS

In his complaint, Mr. Balisok claimed the Defendants violated his due process rights because his witness' statements were not admitted at his infraction hearing, it was not noted on the record why witnesses were not called or statements given, he was denied a staff advisor and Defendant Edwards failed to specify in his reasons for finding Plaintiff guilty which reports and what documents he relied on to make the finding. The Plaintiff alleges he requested witness statements from several inmates and an instructor with the community college. He maintains that some of them were not given statements to fill out, and others wrote statements but Defendant Edwards either denied their existence or refused to consider them.

The Plaintiff also alleges he requested a staff advisor to be present at his hearing, but this allegation was dismissed by this Court's initial order and Plaintiff has not contested that ruling. Plaintiff reports he was found guilty of four major infractions and was sanctioned with ten days isolation, 20 days in segregation, and the loss of 30 days of good-time credits. He alleges he appealed the finding and sanctions, but his appeal was not acted upon and was returned for being too long. Plaintiff asserts he refiled his appeal insisting it should be accepted because the two page limit was not mandatory. He claims his resubmitted appeal was not considered by Defendant Wood.

Plaintiff prays for declaratory and injunctive relief, and for compensatory and punitive damages.

As stated in the Court's initial order, the Constitution does not guarantee the right to appeal the result of an infraction hearing, *Wolff*, 418 U.S. at 564-66. Mr. Balisok argues that he has a state created liberty interest in the appeals process created by WAC 137-28-115. The State of Washington provides for an infraction hearing appeal process, and the regulation outlining the process arguably creates a liberty interest for the inmate in having his appeal heard. WAC 137-28-115.[1] Plaintiff alleges that Defendant Wood responded to his appeal in a memorandum on October 19, 1993 and refused to overturn the sanctions in spite of the due process violations during his infraction hearings. The Plaintiff has not dropped his allegation against Defendant Wood. Accordingly,

IT IS ORDERED:

1. The United States Marshal, in compliance with Fed. R. Civ. P. 4(c) (2) (c) (ii), shall serve, by First Class Mail, a Notice of Lawsuit and Request for Waiver of Service for

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[1]**WAC 137-28-115. Appeal to superintendent** (1) An inmate *may* appeal the decision of the hearing officer to the superintendent by filing a written request for review and his/her reasons therefor with the clerk within twenty-four hours, exclusive of weekends and holidays, after receiving written notice of the decision of the hearing officer. The superintendent may, in his/her discretion, consider appeals filed beyond the twenty-four hour period. WAC 137-28-115(1) (1984) (emphasis added).

Summons and the Complaint and Order Granting Leave to Proceed In Forma Pauperis, upon Defendant Wood, together with two copies of the Waiver of Service and a return envelope, postage prepaid, addressed to the sender.

2. The clerk shall mail a copy of the complaint to the Attorney General for the State of Washington.

3. Defendant Wood shall file an answer or otherwise respond to the Complaint within forty-five (45) days after service. Failure to so respond may result in entry of a default judgment, pursuant to LR 55.

4. Plaintiff shall serve upon Defendant Wood, or if appearance has been entered by counsel, upon her attorney, a copy of every further pleading or other document submitted for consideration by the Court. He shall include with the original paper to be filed with the Clerk of Court a certificate stating the date a true and correct copy of any document was mailed to the Defendant or to her counsel. Any paper received by a District Judge or Magistrate Judge which has not been filed with the Clerk or which fails to include a certificate of service will be disregarded by the Court.

IT IS FURTHER ORDERED, that a telephonic scheduling conference between the court, Plaintiff and counsel for Defendants has already been scheduled for **April 4, 1994 at 3:00 p.m.** The court will initiate the call. On or before March

28, 1994, officials at the Washington State Penitentiary shall furnish the court with the telephone number at which the court can reach Plaintiff at the time and date of the conference.

On or before March 28, 1994, Plaintiff and counsel for Defendants shall file and serve written status reports with respect to the parties' positions concerning:

1. Service of process on parties not yet served;
2. Jurisdiction and venue;
3. Anticipated motions;
4. Anticipated and remaining discovery, including limitations on discovery.
5. Further proceedings, including setting dates for discovery cutoff, pretrial and trial;
6. Appropriateness of special procedures such as consolidation of actions for discovery or pretrial, reference to a master or magistrate or to arbitration;
7. Modification of the standard pretrial procedure due to the relative simplicity or complexity of the action or proceeding;
8. Anticipated trial time required - if reasonable evaluation is practical;
9. Feasibility of bifurcation or otherwise structuring sequence of the trial;
10. Prospects for settlement;
11. Any other matters that may be conducive to the just, efficient and economical determination of the action or proceeding, including the definition or limitation of issues.

12. In his report, Plaintiff shall list the name, address and expected testimony from each witness he desires the court to subpoena to testify at the trial of this matter.

Plaintiff and counsel for Defendants shall also advise the Clerk whether all parties will consent to trial of this case by a Magistrate Judge and whether, in the event of an appeal, the appeal will be taken to the Ninth Circuit Court of Appeals. 28 U.S.C. § 636. In the absence of consent by all parties, disclosure as to which consented and which did not will be made only to the clerk.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to Plaintiff and to counsel for Defendant.

DATED this 4th day of March, 1994.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH

[FILED]
[April 11, 1994]

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NO. CS-93-416-JLQ

SCHEDULING ORDER

JERRY B. BALISOK,

Plaintiff,

vs.

GARY EDWARDS and TANA WOOD,

Defendants.

A telephonic status conference was held in the above-entitled matter on April 4, 1994. Jerry B. Balisok appeared *pro se*; Talis Abolins and Tracey Hawk appeared on behalf of Defendants.

IT IS HEREBY ORDERED:

1. Defendants shall file and serve their final witness list on or before April 20, 1994.

The list shall contain the name, address and a summary of each witness's testimony. The list shall not be supplemented, except for rebuttal, without leave of court to prevent manifest

injustice. The party and/or attorney listing a witness who is not called to testify shall pay the discovery costs, including attorney fees, subject to review by the court to prevent a manifest injustice.

2. All discovery shall be completed on or before June 28, 1994.

3. All dispositive motions shall be filed and served on or before July 7, 1994.

4. THE PARTIES SHALL FILE NO FURTHER DISCOVERY EXCEPT THOSE PORTIONS NECESSARY TO SUPPORT MOTIONS.

5. THERE SHALL BE NO FURTHER JOINDER OF PARTIES.

6. The pretrial conference will be held in Spokane, Washington, at 2:30 p.m., on September 9, 1994. If an agreed Pretrial Order has been lodged, counsel need not appear at that time unless there are unresolved motions or objections to be heard.

7. Trial briefs, requested voir dire and proposed jury instructions shall be filed and served on or before September 19, 1994.

8. The jury trial shall commence at 9:00 a.m., on September 26, 1994, in Spokane, Washington.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel.

DATED this 9th day of April 1994.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
Chief United States District Judge

[FILED]
[April 22, 1994]

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NO. CS-93-416-JLQ

ORDER STAYING DEFENDANTS' MOTION TO STAY

JERRY B. BALISOK,

Plaintiff,

vs.

GARY EDWARDS and TANA WOOD,

Defendants.

BEFORE THE COURT is Defendants' Motion for Stay of Proceedings, (Ct. Rec. 12), heard without oral argument on April 20, 1994. Plaintiff appeared *pro se*; Defendants were represented by Talis Abolins. Having reviewed the record and being fully informed in the matter, the court rules as follows.

This matter presents an important question to the court. However, the Supreme Court recently heard argument on a similar issue in the case of Heck v. Humphrey, 62 U.S.L.W. 3481, reviewing 997 F.2d 355 (7th Cir. 1993). The Court's

decision in Heck will potentially impact the Ninth Circuit's opinion in Young v. Kenny, 907 F.2d 874 (9th Cir. 1989). Accordingly, this court shall stay the hearing on Defendants' Motion for Stay, (Ct. Rec. 12), until the issuance of the Supreme Court's decision in Heck.

IT IS HEREBY ORDERED:

1. Defendants' Motion for Stay of Proceedings, (Ct. Rec. 12), **SHALL BE STAYED.**

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel.

DATED this 20th day of April 1994.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
Chief United States District Judge

[FILED]
[February 6, 1995]

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. CS-93-416-JLQ

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND STAYING ACTION

JERRY B. BALISOK,

Plaintiff,

vs.

GARY EDWARDS, et al.,

Defendants.

BEFORE THE COURT is Defendants' Motion to Dismiss (Ct. Rec. 33) heard without oral argument on January 11, 1995. Plaintiff was represented by attorney Thomas "Speedy" Rice and intern Kristine Balogh of Gonzaga University Legal Assistance; Defendants appeared through Washington Assistant Attorneys General Talis Abolins and Tracey Hawk. Having reviewed the record and being fully advised in this matter, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss is **DENIED** for the following reasons.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Jerry Balisok is an inmate at the Washington State Penitentiary. On August 16, 1993, Mr. Balisok was charged with four prison infractions. In preparation for the infraction hearing, Mr. Balisok requested that Defendant Gary Edwards, the hearing officer, obtain witness statements from various inmates.

At the infraction hearing on September 2, 1993, Mr. Balisok asked that the witness statements be read into the record. According to Plaintiff, Edwards replied that no witness statements had been submitted on his behalf. Mr. Edwards found Mr. Balisok guilty of the charged infractions, and sentenced him to 10 days in isolation and 20 days in segregation, as well as depriving him of 30 days good-time credit toward his sentence.

Mr. Balisok claims that on October 7, 1993, he reviewed his central file, and discovered the witness statements he had wanted read into the record. However, the statements had no "date stamp" indicating the date they were submitted. Plaintiff contends that prison officials purposefully failed to date stamp the witness statements in order to weaken any due process claim he might bring against them for the failure to call his witnesses. According to Mr. Balisok, by not date stamping the statements, prison officials could argue in their defense that the statements

were submitted after the hearing. Balisok claims this is the usual practice when a "jail house attorney" like himself has been infracted. The court can take judicial notice that Mr. Balisok is an inmate who has filed numerous lawsuits in this district, and that he also assists other inmates with their legal actions.

Mr. Balisok appealed Defendant's finding to Defendant Tana Wood, the prison's superintendent. The appeal was rejected because it exceeded a 2-page limit. Plaintiff attempted to resubmit the appeal, but it was again rejected. He then wrote to Superintendent Wood requesting that the infraction appeal be reconsidered. Ms. Wood responded to the letter by affirming the disciplinary finding and the sanctions.

On January 26, 1994, Mr. Balisok filed this civil rights complaint under 42 U.S.C. § 1983 alleging that his disciplinary hearing violated his due process rights. In an amended complaint filed October 28, 1994, Plaintiff narrowed his allegations to a claim for due process violations in the procedures used to impose the disciplinary sanctions against him. Mr. Balisok claims that (1) Defendant Edwards refused to call requested witnesses, produce witness statements, or date stamp witness statements, (2) Defendant Edwards failed to specify what facts and evidence supported the finding of guilt, and (3) Defendants Edwards and Wood failed to specify the facts and evidence that supported the decision to deny Plaintiff's request

to appeal. Thus, Mr. Balisok alleges that he was denied due process at the disciplinary hearing that resulted in his being placed in isolation and segregation, as well as being deprived of good-time credits. Plaintiff seeks declaratory relief that the procedures used violated his constitutional right to due process, injunctive relief to prevent such future violations, and compensatory and punitive damages.

Probably in recognition of state court exhaustion requirements, Mr. Balisok does not specifically seek restoration of his good-time credits in this action. However, he has not waived any future claim for their return should he prevail in this action and, in fact, has expressly reserved the right to make that claim in another forum. It is clear that Mr. Balisok is challenging the very same procedure which resulted in the loss of his good time, and that would be the basis for any future claim for restoration of that good time.

Defendants have moved to dismiss this suit contending that Plaintiff's sole remedy in this court is a federal habeas corpus action, and that Plaintiff has failed to exhaust his state remedies.

DISCUSSION

Generally, when a state prisoner challenges the fact or duration of his confinement and seeks a determination that he is entitled to immediate or speedier release from imprisonment, his

sole federal remedy is a writ of habeas corpus, with its requirement that state remedies must first be exhausted. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1991). Habeas corpus, however, is not the appropriate or even available remedy for damages claims. *Sisk v. Branch*, 974 F.2d 116, 117 (9th Cir. 1992) (citing *Wolff v. McDonnell*, 418 U.S. 539, 554 (1974). Rather, section 1983 authorizes the recovery of money damages for constitutional violations and generally does not require exhaustion of state remedies. *Patsy v. Board of Regents*, 457 U.S. 496, 507 (1982). The exhaustion requirement is a doctrine based on comity, rather than jurisdiction. *Granberry v. Greer*, 481 U.S. 129 (1987). "Federal-state comity is a concern even where, as here, the prisoner does not specifically request the reduction of his sentence in the section 1983 complaint." *Young v. Kenny*, 907 F.2d 874, 875 (9th Cir. 1989).

In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Supreme Court first looked at the issue of a prisoner's constitutional challenge to the deprivation of good-time credits under 42 U.S.C. § 1983. In that case, the prisoners sought only the restoration of good-time credits allegedly withheld unconstitutionally. The Court held that, because the prisoners were challenging the very fact or duration of their confinement, and were seeking a speedier release, their sole federal remedy was by writ of habeas corpus with its exhaustion requirement.

Id. at 500. The Court reasoned, under a federal-state comity doctrine, that the state courts should have the first opportunity to rule on the constitutionality of state convictions. The Court also noted that the comity doctrine was extremely important in a prison disciplinary proceeding setting. The Court justified its holding because "the respondents here sought no damages but only equitable relief--restoration of their good-time credits--and our holding today is limited to that. . ." *Id.* at 494. The Court then added the following statement as *dicta*:

> If a state prisoner is seeking damages, he is attacking something other than immediate or more speedy release. . . In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy. Accordingly, . . . a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies. . .

Id.

That one statement of pure *dicta* has caused federal courts, including the Supreme Court on subsequent occasions a considerable amount of difficulty. One year after the *Preiser* decision, in *Wolff v. McDonnell*, 418 U.S. 539 (1974) the Court dealt with a case where state prisoners were seeking both injunctive relief and monetary damages in a § 1983 action alleging the unconstitutional taking of good-time credits. There, the Court observed that, although *Preiser* foreclosed the claim for the restoration of good-time credits, the instant complaint

also sought damages and cited the *Preiser dicta* stating:

> *Preiser* expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings.

Wolff, at 554 citing *Preiser, supra* at 499 n. 14. Based on the *Preiser dicta*, the Court stated:

> We therefore conclude that it was proper for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already canceled.

Wolff, at 555. Thus, the Court turned *dicta* into law, which suggested that the exclusivity of habeas turns on the type of relief requested by the plaintiff. This has caused lower courts to continue to struggle with damage actions brought under section 1983 regarding the deprivation of good-time credits.

In 1990, the Ninth Circuit addressed the issue in *Young v. Kenny*, 907 F.2d 874 (9th Cir. 1990). There, a prisoner filed a complaint for damages claiming the unconstitutional failure on the part of state officials to apply jail time credits to his prison sentence. The court clearly recognized the comity concern, even where damages were the remedy sought:

> Federal-state comity is a concern where, as here, the prisoner does not specifically request the reduction of his sentence in the section 1983 complaint. Before a district court could award damages to Young, it would have to determine

that his jail time credits were unconstitutionally withheld. Such a ruling would not bar a state from relitigating the issue in a subsequent state habeas proceeding because 'neither a State nor its officials acting in their official capacity are persons under § 1983 when the relief sought is damages. . . . Nevertheless should a federal court find a term of imprisonment unlawful without first giving the state court system an opportunity to correct its own constitutional errors, it may result in 'unnecessary friction between the federal and state court systems." . . . Were the state court then to uphold the sentence, the prisoner would be entitled to bring federal habeas, perhaps in the same district court that had earlier ruled that the sentence was unlawful. The purpose of the exhaustion requirement--to give the state courts the first opportunity to rule on the claims of state prisoners--would accordingly be frustrated. As a result, habeas must be the exclusive federal remedy not just when a state prisoner requests the invalidation or reduction of his sentence, but whenever the requested relief requires as its predicate a determination that a sentence currently being served is invalid or unconstitutionally long.

Id. at 876. In *Young*, the court noted that "all nine federal circuit courts to consider this question have arrived at the same conclusion." *Id.* However, the court was careful to express that it "share[d] a concern expressed by many of those courts regarding the apparent contradiction with *Wolff*. The Ninth Circuit justified its departure from *Wolff* by citing another *dictum* statement of the Supreme Court in *Tower v. Glover*, 467 U.S. 914 (1984), where the Court stated that "We . . . have no occasion to decide if a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself." *Id.* at 923. The *Young* court concluded:

> Because Young is still in prison and has failed to exhaust his state remedies, a federal court judgment that his jail-time credits have been improperly withheld would undermine the exhaustion requirement in federal habeas actions and frustrate important values of federal-state comity.

Id. at 878.

Here, like in *Young*, should this court find the disciplinary proceeding resulting in the loss of good time unlawful without first giving the state court system an opportunity to correct its own constitutional errors, it may result in "unnecessary friction between the federal and state court systems." Were the state court then to uphold the validity of the sanction, the prisoner would be entitled to bring a federal habeas action, perhaps in the same district court that had earlier ruled that the proceeding, and thus its sanction, was unlawful. The purpose of the exhaustion requirement--to give the state courts the first opportunity to rule on the claims of state prisoners--would accordingly be frustrated.

Subsequent to *Young*, in *Sisk v. CSO Branch*, 794 F.2d 116 (9th Cir. 1991), prisoners challenged the constitutionality of a prison disciplinary hearing, and sought their return from a high security to medium security unit, damages for being transferred to high security, and restoration of forfeited good-time credits. A different Ninth Circuit panel held that where there was no direct relationship between the challenged proceedings and the

prisoner's release dates, "the speculative and incidental effect of prison disciplinary procedures on the duration of plaintiff's sentence is not sufficient to bring any part of this action within the 'core of habeas corpus.' A federal court need not stay its hand merely because these sanctions were imposed concurrently with a revocation of good time." *Id*. at 118. Although the *Sisk* court cited the *Young* case, it made no attempt to recognize the holding therein, did not distinguish it factually, and did not discuss it in any way. Assuming the *Sisk* decision conflicts with that in *Young*, *Young* controls here. If two decisions conflict within a circuit, the earlier decision controls unless the circuit decides the question *en banc* or the Supreme Court reverses the earlier panel, neither having occurred here. See *United States v. Hardesty*, 977 F.2d 1347, 1347-48 (9th Cir. 1992) (*en banc*); *United States v. Magana*, 797 F.2d 777, 779 (9th Cir. 1986).

In its latest case on the issue of good-time credit *Heck v. Humphrey*, ___ U.S. ___, 114 S. Ct. 2364 (1994), the Supreme Court specifically addressed the question of "whether a state prisoner may challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. s 1983." *Id*. at 2364. The Court affirmed a Seventh Circuit judgment that "[i]f, regardless of the relief sought, the plaintiff in a federal civil rights action is challenging the legality of his conviction so that if he won his case the state would be obligated to release him even if he hadn't

sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so." *Heck v. State*, 997 F.2d 355, 357 (7th Cir. 1993). The Supreme Court holding also affirmed, by implication, the *Young* decision.

The Supreme Court did not address the petitioner's argument that a finding validating his damages claim would not invalidate his conviction, finding that petitioner's argument in that regard was untimely and completely factual. Mr. Balisok makes the identical argument here. "Balisok's § 1983 claim does not allege that had he been able to call certain witnesses, he would not have been found guilty in the disciplinary hearing. Therefore, he claims that "a judgment in favor of Balisok on this issue would not necessarily imply the disciplinary action was invalid. " Plaintiff's Response to Motion to Dismiss, p. 12.

This court cannot agree. Mr. Balisok seeks declaratory and injunctive relief and monetary damages for the alleged due process violations. If the court should find that the disciplinary hearing at issue did violate Petitioner's due process rights, it would necessarily follow that the resulting sanctions, including the loss of good-time credit, were also unconstitutional and invalid. Such a finding would be binding on a state court looking at the good-time issue, and a restoration of Petitioner's good-time credit by the state court would be required as *res*

judicata. Any other result would clearly create an inconsistent judgment by the state and federal court completely frustrating any idea of federal-state comity.

The court is satisfied that despite Petitioner's requested relief, it is clear that his due process claim is a challenge to his conviction of an offense at the disciplinary proceeding, which would affect the length of his sentence. "[W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck, supra*, 114 S. Ct. at 2372. "A § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." *Id*. at 2374.

As the Supreme Court noted in *Heck*, although a suit seeking damages for an allegedly unreasonable search, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful, "[i]n order to recover compensatory damages, however, the § 1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury. . ., which we hold today, does not encompass the "injury" of being convicted and imprisoned (until

his conviction has been overturned.) *Id*. at 2373.

For this court to find in favor of the Petitioner in this case, and issue a declaratory judgment that the disciplinary proceeding violated due process would clearly require a finding that the disciplinary proceeding, as well as the sanctions imposed were unconstitutional. Likewise, to award Petitioner damages for a compensable injury due to the deprivation of good time would mandate a finding that he was injured due to the unconstitutional deprivation of good-time credits, which would also clearly require the restoration of the good-time credits, thereby rendering the length of his sentence invalid. Before this court could award damages and/or declaratory or injunctive relief to Mr. Balisok on his § 1983 claim, it would have to determine that the process that resulted in the loss of his good-time credits was constitutionally infirm. If Mr. Balisok is successful in this way, the restoration of good-time credits would be required, even though that relief was not formerly sought herein. To do so, without giving the state court system an opportunity to correct the state's own constitutional errors, would result in "unnecessary friction between the federal and state court systems." *Preiser, supra* at 490. Thus, this court may not consider Plaintiff's s 1983 action until he has exhausted his state remedies as to the length of his sentence.

As previously stated, Mr. Balisok is not formally seeking

the return of his good-time credits in this action. However, he has not fully waived his good-time claim, and if he were to prevail in this court, he could then bring the good-time claim in state court. Were the state courts to subsequently uphold the taking of the good-credits, Mr. Balisok would then be entitled to bring a federal action in the same court that had earlier ruled that the taking of credits was unlawful. This would clearly frustrate the purpose of exhaustion requirement--to give state courts the first opportunity rule on the constitutional claims of state prisoners. *Id.*

Under *Heck*, the finding of this court that a judgment in favor of the Plaintiff would necessarily imply the invalidity of the disciplinary hearing and the resulting sanctions might lead to the conclusion that Plaintiff's complaint under 28 U.S.C. § 1983 should be dismissed. However, because Plaintiff is not seeking the return of his good-time credit in this action, and is seeking damages for his injury as a result of his placement in segregation and isolation, as well as his injury in losing good time, he has claimed injury separate and apart from any unconstitutional deprivation of good-time, and under *Young, supra*, the appropriate procedure is to stay Plaintiff's § 1983 action pending resolution of the good-time claim in state courts. For the reasons stated herein, **IT IS ORDERED** that Plaintiff's Complaint and the claims therein are **HEREBY STAYED**.

This court is satisfied that this decision will likely have precedential value at least within this district, and that there is a substantial ground for a difference of opinion on this issue. Therefore, the court finds that an immediate appeal from this Order may materially advance the ultimate termination of this litigation pursuant to 28 U.S.C. § 1292(b).

IT IS SO ORDERED. The Clerk is directed to enter this Order, forward a copy to counsel and close this file, subject to reopening upon a showing by the Plaintiff that he has exhausted his state remedies on his good-time claim.

DATED this 3rd day of February 1995.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
CHIEF UNITED STATES DISTRICT JUDGE

[FILED]
[April 3, 1995]

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. CS-93-416-JLQ

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

JERRY B. BALISOK,

Plaintiff,

vs.

GARY EDWARDS and TANA WOOD,

Defendants.

BEFORE THE COURT is Plaintiff's Motion for Reconsideration of the court's Order Denying Defendants' Motion to Dismiss and Staying Action (Ct. Rec. 48) heard without oral argument on March 30, 1995. Attorney Thomas "Speedy" Rice and Legal Intern Kristine Balogh of Gonzaga University Legal Assistance represent Plaintiff. Assistant Attorney Generals General Talis Abolins and Tracey Hawk represent Defendants. Having reviewed the record, and being fully advised in this matter **IT IS HEREBY ORDERED** that

Plaintiff's Motion for Reconsideration (Ct. Rec. 48) is **DENIED** for the following reasons.

The factual background of this case is set forth in the court's Order Denying Defendants' Motion to Dismiss and Staying Action entered on February 6, 1995, (Ct. Rec. 47) and will not be repeated here. The court's ruling was based on its interpretation of applicable case law, particularly Heck v. Humphrey, ___ U.S. ___, 114 S.Ct. 2364 (1994) and Young v. Kenny, 907 F.2d 874 (9th Cir. 1990). The court found that its decision was likely to have precedential value at least within this district, that there is a substantial ground for difference of opinion on the issue presented in this case, and that an immediate appeal of the court's Order may materially advance the ultimate termination of this litigation pursuant to 28 U.S.C. § 1292(b).

Following entry of that Order, on February 17, 1995, Plaintiff filed a Petition for Permission to Appeal at the Ninth Circuit. Defendants likewise filed such a Petition at the Circuit. On March 7, 1995, Plaintiff filed this Motion for Reconsideration of this court's Order in this court. On March 23, 1995, the Ninth Circuit entered an Order transferring the Petitions for Permission to Appeal to this court and directing the clerk to file them as a timely Notice of Appeal and Notice of Cross-Appeal.

Because Plaintiff's Motion for Reconsideration was not filed within 10 days from entry of the subject Order, the court will treat Plaintiff's Motion for Reconsideration as one made pursuant to Fed. R. Civ. P. 60(b). Under Rule 60(b), relief is available only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) extraordinary circumstances. School Dist. No. 1J v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

Plaintiff's Motion for Reconsideration claims only that the court erred in its interpretation of the applicable law. As the court has previously found, reasonable minds could differ as to the prevalent issue in this case, and the court is satisfied that an immediate appeal is the most expedient way of resolving it. Accordingly, Plaintiff's Motion for Reconsideration is **DENIED**.

IT IS SO ORDERED. The Clerk is directed to enter this Order, and forward a copy to counsel.

DATED this 31st day of March 1995.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
CHIEF UNITED STATES DISTRICT JUDGE

[FILED]
[January 26, 1994]

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. CS-93-0416-JLQ

CIVIL RIGHTS COMPLAINT
WITH A JURY DEMAND

JERRY B. BALISOK,

PLAINTIFF,

v.

GARY EDWARDS; TANA WOOD,

DEFENDANTS.

CIVIL RIGHTS COMPLAINT
WITH A JURY DEMAND

This is a civil rights complaint under 42 U.S.C. §1983 filed by Jerry B. Balisok, a pretrial detainee currently being housed at Washington State Penitentiary. Plaintiff is a pretrial detainee due to the fact that his former conviction was overturned by the Washington State court of Appeals, Division I, on December 31, 1992 and plaintiff was remanded for trial. The decision of the appeals Court is published in 68 Wn App

277. Plaintiff alleges violation of his constitutional rights and is seeking money damages, declaratory judgement, and injunctive relief. Plaintiff requests a trial by jury.

JURISDICTION

This is a civil rights action under 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. §1343 and §1331.

VENUE

Venue is proper pursuant to 28 U.S.C. § 1391(b) as all acts portrayed in the facts section occurred in Walla Walla County and all defendants live in Walla Walla County, which is within the Eastern District Court's Judicial District.

PARTIES

Plaintiff Jerry B. Balisok is a pretrial detainee presently housed at Washington State Penitentiary (WSP), Walla Walla, Washington.

Defendant Gary Edwards was a Corrections Lieutenant assigned to be in charge of and conduct Major Infractions Hearings at the Intensive Management Unit (IMU) at WSP, on August 25, 1993 through and including October 7, 1993.

Defendant Tana Wood was the Superintendent at WSP from August 25, 1993 throughand including October 29, 1993.

FACTS

1. Plaintiff was placed in Administrative Segregation on August 4, 1993 based on confidential information supplied by

inmate John Adams, DOC #287645.

2. Plaintiff was given a HEARING NOTICE/APPEARANCE WAIVER for a major infraction hearing on August 18, 1993. Plaintiff received the NOTICE after having been placed in the Intensive Management Unit (IMU) at Washington State Penitentiary on the same day.

3. The NOTICE informed plaintiff that his disciplinary hearing was scheduled for August 20, 1993.

4. Plaintiff did not receive his INFRACTION REPORT until he arrived at the HEARING. The HEARING was conducted by defendant Edwards.

5. Plaintiff was shown the INFRACTION REPORT and asked to comment on it, by defendant Edwards.

6. Plaintiff requested an extension of time so he could address the information in the INFRACTION REPORT and resolve it against the one inch thick stack of witness statements and evidence against him that had been received on August 18, 1993 with the NOTICE.

7. Plaintiff received the time extension and the HEARING met again on August 25, 1993, at which time defendant Edwards requested an extension of time. Plaintiff agreed to the time extension.

8. The HEARING was reconvened on September 2, 1993.

9. Plaintiff was found guilty of four major infractions.

10. Plaintiff was sanctioned with 10 days of isolation time; 20 days segregation time; and loss of 30 days good-time from his sentence.

11. On August 18, 1993 plaintiff had requested witness statements from inmate John (Jack) Stein, DOC #955827.

FACTS

12. Mr. Stein's witness statement was required by defendant Edwards to be submitted no later than August 20,1993.

13. Mr. Stein completed his witness statement and submitted it on August 19, 1993.

14. Mr. Stein's witness statement completely exculpated plaintiff of any wrongdoing in connection with his four major infractions of August 16, 1993. These are the same infractions described in paragraph 6.

15. Plaintiff appealed his infractions of August 16, 1993 on September 2, 1993, the same day he was found guilty.

16. Plaintiff's appeal was returned to him. Plaintiff was instructed by letter that his appeal was too long at eight pages and that he should limit it to two pages..

17. Plaintiff returned the appeal in its full lenghth with the letter requesting it be no more than two pages in lenghth.

18. Plaintiff wrote on the letter: "I suggest that you read the instruction in #2 above carefully, to wit: '2. This appeal should be:' The word 'should' denotes that the instruction is a suggestion, not a hard and fast rule. The word 'should' does not fill the requirement of 'mandatory language,' but rather it is conditional language predicated on my choice, not the institution since they are giving me the leeway by using only a suggestion in their instructions. My decision to have WSP adhere to their own rules; stick to the non-mandatory and conditional nature of the instruction. Failure to do this will result in another serious due process violation. I demand, as is my right, under the due process clause of the 14th amendment to the U.S. Constitution and Article 1, §3 of the constitution of the State of Washington, that my appeal be accepted in its full 8 page form and that it be granted. For Instruction 2 to be mandatory it should read: 'This appeal (must; shall) be:,' but since it is not

FACTS

18. (continued) worded that way, I do not have to limit my appeal to 2 pages. Deny my appeal for exceeding 2 pages in lenghth or for any other reason and let the games begin. I'm looking forward to hearing a federal judge tell Dodd, Van Boening, Walter Ponti, Snively, Henderson, Edwards, et al that they are criminals. The placing of me on 23 hour a day

lockdown, given my pretrial detainee, is just icing on the cake. Turn down my appeal at your own legal peril. s/Jerry Balisok 964334. P.S. The institution did not mind prosecuting me on false information with over 50 pages of lies. How am I supposed to defend myself against 50 pages of lieswith only two pages of truth?"

19. Plaintiff resubmitted his appeal, the letter, and his note on September 3, 1993.

20. On September 18, 1993 Corrections Officer (C/O) Hamilton informed plaintiff that plaintiff would begin 10 days of isolation time as prescribed by the sanction ordered by defendant Edwards.

21. Plaintiff filed a grievance complaining that the sanction was being imposed without the latest results from his HEARING APPEAL and because plaintiff had not received notice through an INFRACTION SANCTION NOTICE that his sanction would begin.

22. Defendant Edward responded to plaintiff's grievance. Defendant Edwards responded that plaintiff had submitted an 8 page appeal, it had been rejected and that plaintiff had not resubmitted it.

23. Defendant Edwards is lying about plaintiff not having resubmitted his appeal. The proof of that is that when plaintiff was released from IMU he requested a records review.

24. PLaintiff found photocopies of his appeal, the letter suggesting he limit his appeal to two pages, plaintiff's note as described in paragraph 18, and Mr. Stein's witness statement dated August 19, 1993, in his central file during his records review.

FACTS

25. On September 2, 1993 plaintiff asked Defendant Edwards to read Mr. Stein's witness statement in to the record of the HEARING.

26. Defendant Edwards told plaintiff that Mr. Stein had not turned in a witness statement.

27. Defendant Edwards lied to plaintiff about Mr. Stein not having turned in a witness statement.

28. Defendant Edwards withheld Mr. Stein's witness statement from the HEARING.

29. Defendant Edwards withheld Mr. Stein's witness because it contained exculpatory evidence that would have totally cleared plaintiff.

30. Defendant Edwards punishing plaintiff by placing a disciplinary sanction against him of 10 days isolation, 20 days segregation, and 30 days loss of good-time violated plaintiff's right to due process.

31. Plaintiff requested a staff advisor because he had previously attempted suicide in ISU 4-wing and was presently

suffering from sensory deprivation psychosis.

32. Defendant Edwards denied plaintiff a staff advisor, which violated plaintiff's right to due process.

33. On August 25, 1993 Lt. Edwards asked plaintiff if he wanted any additional witness statements. Plaintiff responded that he wanted witness statements sent to inmates Charles Harris and Sherman Pulley and that plaintiff wanted defendant Edwards to take down the questions that plaintiff wanted inmates Harris and Pulley to answer. Lt. Edwards responded that he would write down the questions at the next HEARING on September 2, 1993.

34. On September 2, 1993 at plaintiff's HEARING the first thing plaintiff requested was the Lt. Edwards take down the questions plaintiff wanted asked of inmates Harris and Pulley.

FACTS

35. Defendant Edwards response to plaintiff's request was that he had already sent out the witness statements and that inmates Pulley and Harris had not responded.

36. Defendant Edwards lied to plaintiff again. Plaintiff found inmate Pulley's witness statement in his central file during his records review.

37. Inmate Pulley stated that he did not know why plaintiff was in segregation.

38. Had defendant Edwards kept his word and allowed plaintiff to pose questions to inmate Pulley, plaintiff could have proven that inmate Adams had lied about an incident that Pulley witnessed and proven that Adams was causing an innocent person to be moved against, in violation of WAC 137-28-552, a major offense.

39. Defendant Edwards denied plaintiff a fair hearing by withholding Mr. Stein's witness statement.

40. Defendant Edwards denied plaintiff a fair hearing by refusing to take down questions for inmates Pulley and Harris to answer.

41. Defendant Edwards found plaintiff guilty of four major infractions while knowing that he had withheld Mr. Stein's witness statement, on September 2, 1993.

42. Defendant Edwards found plaintiff guilty of four major infractions while knowing that he had violated his promise to take down questions from plaintiff for inmates Harris and Pulley to answer, on September 2, 1993.

43. Defendant Edwards finding plaintiff guilty of four major infractions, while withholding Mr. Stein's witness statement, denied plaintiff a fair hearing.

44. Defendant Edwards finding plaintiff guilty of four major infractions, without posing questions to inmates Harris and Pulley, denied plaintiff a fair hearing.

FACTS

45. On August 18, 1993 plaintiff requested a witness statement from Mrs. Ruth Greenway, a teacher on the Education Floor. Mrs. Greenway had direct and personal knowledge that Adams was lying to staff about several of his claims.

46. Defendant Edwards failed to send Mrs. Greenway a witness statement.

47. Defendant Edwards failure to send a witness statement to Mrs. Greenway denied plaintiff a fair hearing.

48. On September 2, 1993 defendant Edwards told plaintiff that CUS Ken Jurgenson had submitted a witness statement, but he refused to allow plaintiff to see it, read it, and he refused to read it into the record. Defendant Edwards offered no explanation for his refusals.

49. Plaintiff discovered in another document prepared by CUS Jurgenson that Adams had put one account of his lies in writing and had told a contradictory account to CUS Jurgenson, which Jurgenson had noted.

50. Plaintiff alleges that defendant Edwards withheld CUS Jurgenson's witness statement because it contained exculpatory evidence that would have cleared plaintiff.

51. Defendant Edwards withholding CUS Jurgenson's statement denied plaintiff a fair hearing.

52. On September 2, 1993 plaintiff informed defendant Edwards that inmate David Jirovec had written plaintiff and had informed him that a large number of inmates had told him that they had personal knowledge that plaintiff had been set up by Adams.

53. Plaintiff requested that defendant Edwards take a witness statement from inmate Jirovec.

54. Defendant Edwards refused to take a witness statement from inmate Jirovec.

FACTS

55. Defendant Edwards refusing to take a witness statement from inmate Jirovec denied plaintiff a fair hearing.

56. Defendant Edwards found plaintiff guilty of four major infractions knowing that he had withheld CUS Jurgenson's witness statement from plaintiff.

57. Defendant Edwards found plaintiff guilty of four major infractions knowing that he had refused to send a witness statement to inmate Jirovec.

58. Defendant Edwards found plaintiff guilty of four major infractions on September 2, 1993.

59. On FORM D, page 1 of 3, defendant Edwards summarized the reasons for finding plaintiff guilty as: "Written rpt and testimony, documents provided."

60. Defendant Edwards did not state which written report was used to find plaintiff guilty.

61. Defendant Edwards did not state who submitted the written report that was used to determine guilt.

62. Defendant Edwards did not specify which of the documents was used to determine guilt.

63. Defendant Edwards did not specify whose testimony was used to determine guilt.

64. Defendant Edwards did not state his individualized reasons for refusing to submit a witness statement from inmate Jirovec or Mrs Greenway.

65. The decision of defendant Edwards to lie on plaintiff's grievance concerning plaintiff not having resubmitted his appeal stopped plaintiff's appeal from being submitted to the Superintendent for review of plaintiff's having been found guilty caused plaintiff's appeal to not be looked for by staff. Because staff did not look for

FACTS

65. (continued) plaintiff's appeal plaintiff was denied his rights to appeal, in violation of WAC 137-28-115 (1)(2)(3)(4)(5).

66. The decision of defendant Edwards to lie to plaintiff concerning Mr. Stein's witness statement being submitted and then to withhold the statement denied plaintiff a fair hearing and violated his rights to due process.

67. The decision of defendant Edwards to punish plaintiff with a disciplinary sanction of 10 days isolation, 20 days segregation, and 30 days loss of good-time denied plaintiff due process.

68. The decision of defendant Edwards to deny plaintiff a staff advisor denied plaintiff due process.

69. The decision of defendant Edwards to refuse to take down questions for inmates Harris and Pulley to answer on their witness statements denied plaintiff due process.

70. The decision of defendant Edwards to find plaintiff guilty of four major infractions while knowing that he had violated his promise to take down questions from plaintiff for inmates harris and Pulley to answer on September 2, 1993 denied plaintiff due process.

71. The decision of defendant Edwards to find plaintiff guilty of four major infractions while knowing that he had withheld Mr. Stein's witness statement denied plaintiff due process.

72 The decision of defendant Edwards to find plaintiff guilty of four major infractions knowing that he had refused to send Mrs. Greenway a witness statement denied plaintiff due process. This decision was made despite plaintiff having told defendant Edwards that Mrs. Greenway had direct and personal

knowledge that Adams was lying to staff about several of his claims.

73. The decision of defendant Edwards to withhold CUS Jurgenson's witness statement from plaintiff and his decision to refuse to read

FACTS

73. (continued) CUS Jurgenson's witness statement into the record denied plaintiff due process. Defendant Edwards made this decision despite plaintiff having told him that Adams had told CUS Jurgenson one version of the events in writing and then had told another version of the events verbally and that CUS Jurgenson had noted the discrepancy.

74. The decision of defendant Edwards to refuse to take a witness statement from inmate Jirovec denied plaintiff due process.

75. The decision of defendant Edwards to find plaintiff guilty of four major infractions while knowing that he had refused to take a witness statement from inmate Jirovec while knowing that inmate Jirovec had knowledge of other individuals that had personal and direct knowledge that Adams had set plaintiff up on false charges denied plaintiff his right to due process.

76. The decision of defendant Edwards to summarize the reasons for finding plaintiff guilty of four major infractions

by writing, "Written rpt and testimony, documents provided," denied plaintiff his right to due process

77. The decision of defendant Edwards to fail to state which written report was used to find plaintiff guilty of four major infractions violated plaintiff's right to due process.

78. The decision of defendant Edwards to fail to state who submitted the written report that was used to find plaintiff guilty of four major infractions was used to determine that plaintiff was guilty of four major infractions violated plaintiff's right to due process.

79. The decision of defendant Edwards to fail to state his individualized reasons for refusing to submit witness statements to inmate Jirovec and Mrs. Greenway, which caused plaintiff to be found guilty of four major infractions denied plaintiff due process.

FACTS

80. The decisions of defendant Edwards caused plaintiff to be held in IMU from September 2, 1993 through and including October 7, 1993.

81. The actions of defendant Edwards caused plaintiff to be held in IMU from September 2, 1993 through and including October 7, 1993.

82. Defendant Edwards causing plaintiff to be in IMU from September 2, 1993 through October 7, 1993 has violated

plaintiff's right to due process.

83. On October 19, 1993 plaintiff wrote to defendant Wood and asked her to reconsider my infraction appeal because defendant Edwards had lied to her concerning my appeal not being resubmitted and because he had withheld Mr. Stein's witness statement from the proceedings.

84. Defendant wood responded to plaintiff's request with her SUPERINTENDENT'S MEMORANDUM of October 29, 1993 and refused to overturn defendant Edwards ruling and sanctions.

85. The decision of defendant Wood to refuse to remove the infractions and sanctions from plaintiff's records has denied plaintiff due process.

86. The due process that plaintiff was due from defendant Wood was the removal of these false infractions from plaintiff's record and the restoration of plaintiff's good-time credits since plaintiff was denied due process during the disciplinary hearing conducted by defendant Edwards.

CLAIMS

FIRST CAUSE OF ACTION

87. The actions and/or decisions of the defendants in paragraphs 1 through 86 violated plaintiff's right to due process while acting under color of state law, in violation of the Fourteenth Amendment.

88. Plaintiff's right to due process was violated when:

a) Defendant Edwards withheld Mr. Stein's witness statement from plaintiff's disciplinary hearing of September 2, 1993.

b) Defendant Edwards denied plaintiff a staff advisor at plaintiff's disciplinary hearing of September 2, 1993.

c) Defendant Edwards sent out witness statements to inmates Harris and Pulley before plaintiff could give him the questions that plaintiff wanted answered.

d) Defendant Edwards made the decision to send out witness statements to inmates Harris and Pulley before plaintiff could give him the questions that plaintiff that plaintiff wanted asked.

e) Defendant Edwards made the decision to withhold Mr. Stein's witness statement.

f) Defendant Edwards found plaintiff guilty of four major infractions while knowing that he had withheld Mr. Stein's witness statement.

g) Defendant Edwards found plaintiff guilty of four major infractions while knowing that he had violated his promise to take down questions

from plaintiff for inmates Harris and Pulley to answer, on September 2, 1993.

h) Defendant Edwards made the decision to find plaintiff guilty of four major infractions while knowing that he had violated his promise to take down questions from plaintiff for inmates Harris and Pulley to answer, on September 2, 1993.

CLAIMS

FIRST CAUSE OF ACTION

88. continued

i) Defendant Edwards failed to send Mrs. Greenway a witness statement.

j) Defendant Edwards withheld CUS Jurgenson's witness statement.

k) Defendant Edwards failed to send inmate Jirovec a witness statement.

l) Defendant Edwards found plaintiff guilty of four major infractions knowing that he had withheld CUS Jurgenson's witness statement from plaintiff.

m) Defendant Edwards found plaintiff guilty of four major infractions knowing that he had refused to send a witness statement to inmate Jirovec.

n) Defendant Edwards did not state which written report was used to find plaintiff guilty.

o) Defendant Edwards did not state who submitted the written report that was used to determine guilt.

p) Defendant Edwards did not specify which of the documents was used to determine guilt.

q) Defendant Edwards did not specify whose testimony was used to determine guilt.

r) Defendant Edwards did not state his individualized reasons for refusing to submit a witness statement to inmate Jirovec or Mrs. Greenway.

s) The decision of defendant Edwards to lie on plaintiff's grievance concerning plaintiff not having resubmitted his appeal stopped plaintiff's appeal from being submitted to the Superintendent for review of plaintiff's having been found guilty caused plaintiff's appeal to not be looked for

CLAIMS

FIRST CAUSE OF ACTION

88. continued

s) (continued) by staff. Because staff did not look

for plaintiff's appeal WAC 137-28-115(1)(2)(3)(4)(5) was violated.

t) The decision of defendant Edwards to lie to plaintiff concerning Mr. Stein's witness statement being submitted and then to withhold the statement denied plaintiff due process.

u) The decision of defendant Edwards to punish plaintiff with a disciplinary sanction of 10 days isolation, 20 days segregation, and 30 days loss of good-time denied plaintiff due process.

v) Defendant Edwards decided to deny plaintiff a staff advisor.

w) Defendant Edwards decided to find plaintiff guilty of four major infractions while knowing that he had withheld Mr. Stein's witness statement.

x) Defendant Edwards decided to find plaintiff guilty of four major infractions while knowing that he had refused to send Mrs. Greenway a witness statement.

y) Defendant Edwards decided to not send Mrs. Greenway a witness statement.

z) Defendant Edwards decided to withhold CUS Jurgenson's witness statement.

aa) Defendant Edwards decided to not read CUS Jurgenson's witness statement into the record.

ab) Defendant Edwards decided to not send inmate Jirovec a witness statement.

ac) Defendant Edwards decided to find plaintiff guilty of four major infractions knowing that he had withheld CUS Jurgenson's witness statement.

CLAIMS

FIRST CAUSE OF ACTION

88. continued

ad) Defendant Edwards decided to find plaintiff guilty of four major infractionsknowing that he had ~~had~~ refused to read CUS Jurgenson's witness statement into the record.

ae) Defendant Edwards decided to summarize the reasons for finding plaintiff guilty of four major infractions by writing, "Written rpt and testimony, documents provided."

af) Defendant Edwards decided to not state which written report was used to find plaintiff guilty of four major infractions.

ag) Defendant Edwards decided to not state who submitted the written report that was used to

find plaintiff guilty of four major infractions.

ah) Defendant Edwards decided to not state the individualized reasons for refusing to submit witness statements to inmate Jirovec and Mrs. Greenway.

ai) Defendant Edwards decided to find plaintiff guilty of four major infractions knowing that he had decided to summarize the reasons for finding plaintiff guilty of four major infractions by writing, "Written rpt and testimony, documents provided."

aj) Defendant Edwards decided to find plaintiff guilty of four major infractions knowing that he decided to not state which written report was used to find plaintiff guilty of four major infractions.

ak) Defendant Edwards decided to find plaintiff guilty of four major infractions knowing that he had decided to not state who submitted the written report that was used to find plaintiff guilty of four major infractions.

CLAIMS

FIRST CAUSE OF ACTION

88. continued

al) Defendant Edwards found plaintiff guilty of four major infractions knowing that he had decided to not submit witness statements to inmate Jirovec and Mrs. Greenway.

am) The decisions of defendant Edwards caused plaintiff to be held in IMU from September 2, 1993 through October 7, 1993.

an) The actions of defendant Edwards caused plaintiff to be held in IMU from September 2, 1993 through October 7, 1993.

ao) Defendant Wood decided to refuse to remove the four major infractions from plaintiff's records..

ap) Defendant Wood refused to remove the four major infractions from plaintiff's records.

aq) Defendant Wood decided to allow the four major infractions to remain on plaintiff's record.

ar) Defendant wood allowed the four major infractions to remain on plaintiff's record.

RELIEF

Wherefore plaintiff Jerry B. Balisok requests this Honorable Court grant the following relief:

A. Issue a declaratory judgment that defendants violated the Fourteenth Amendment when:

1. Defendant Edwards withheld Mr. Stein's witness statement from plaintiff's disciplinary hearing of September 2, 1993.
2. Defendant Edwards denied plaintiff a staff advisor at plaintiff's disciplinary hearing of September 2, 1993.
3. Defendant Edwards sent out witness statements to inmates Harris and Pulley before plaintiff could give him the questions that plaintiff wanted answered.
4. Defendant Edwards made the decision to send out witness statements to inmates Harris and Pulley before plaintiff could give him the questions that plaintiff wanted asked.
5. Defendant Edwards made the decision to withhold Mr. Stein's witness statement.
6. Defendant Edwards found plaintiff guilty of four major infractions while knowing that he had withheld Mr. Stein's witness statement.

7. Defendant Edwards found plaintiff guilty of four major infractions while knowing that he had violated his promise to take down questions from plaintiff for inmates harris and Pulley to answer, on September 2, 1993.
8. Defendant Edwards made the decision to find plaintiff guilty of four major infractions while knowing that he had violated his promise to take down questions from plaintiff for inmates Harris and Pulley to answer, on September 2, 1993.

RELIEF

A. continued

9. Defendant Edwards failed to send Mrs. Greenway a witness statement.
10. Defendant Edwards withheld CUS Jurgenson's witness statement.
11. Defendant Edwards failed to send inmate Jirovec a witness statement.
12. Defendant Edwards found plaintiff guilty of four major infractions knowing that he had withheld CUS Jurgenson's

witness statement from plaintiff.

13. Defendant Edwards found plaintiff guilty of four major infractions knowing that he had refused to send a witness statement to inmate Jirovec.

14. Defendant Edwards did not state which written report was used to find plaintiff guilty.

15. Defendant Edwards did not state who submitted the written report that was used to determine guilt.

16. Defendant Edwards did not specify which of the documents was used to determine guilt.

17. Defendant Edwards did not specify whose testimony was used to determine guilt.

18. Defendant Edwards did not state his individualized reasons for refusing to submit a witness statement to inmate Jirovec or Mrs. Greenway.

19. The decision of defendant Edwards to lie on plaintiff's grievance concerning plaintiff not having resubmitted his

appeal stopped plaintiff's appeal from being submitted to the Superintendent for review of plaintiff's having been found guilty caused plaintiff's appeal to not be looked for by staff. Because staff did not look for plaintiff's

RELIEF

A. continued

19. (continued) appeal WAC 137-28-115(1)(2)(3)(4)(5) was violated.

20. The decision of defendant Edwards to lie to plaintiff concerning Mr. Stein's witness statement being submitted and then to withhold the statement denied plaintiff due process.

21. The decision of defendant Edwards to punish plaintiff with a disciplinary sanction of 10 days isolation, 20 days segregation, and 30 days loss of good time denied plaintiff due process.

22. Defendant Edwards decided to deny plaintiff a staff advisor.

23. Defendant Edwards decided to find plaintiff guilty of four major infractions

while knowing that he had withheld Mr. Stein's witness statement.

24. Defendant Edwards decided to find plaintiff guilty of four major infractions while knowing that he had refused to send Mrs. Greenway a witness statement.

25. Defendant Edwards decided to not send Mrs. Greenway a witness statement.

26. Defendant Edwards decided to withhold CUS Jurgenson's witness statement.

27. Defendant Edwards decided to not read CUS Jurgenson's witness statement into the record.

28. Defendant Edwards decided to not send inmate Jirovec a witness statement.

29. Defendant Edwards decided to find plaintiff guilty of four major infractions knowing that he had withheld CUS Jurgenson's witness statement.

30. Defendant Edwards decided to find plaintiff guilty of four major infractions knowing that he had refused to read

CUS Jurgenson's witness statement into the record.

RELIEF

A. continued

31. Defendant Edwards decided to summarize the reasons for finding plaintiff guilty of four major infractions by writing, "Written rpt and testimony, documents provided."

32. Defendant Edwards decided to not state which written report was used to find plaintiff guilty of four major infractions.

33. Defendant Edwards decided to not state who submitted the written report that was used to find plaintiff guilty of four major infractions.

34. Defendant Edwards decided to not state the individualized reasons for refusing to submit witness statements to inmate Jirovec and Mrs. Greenway.

35. Defendant Edwards decided to find plaintiff guilty of four major infractions knowing that he had decided to summarize the reasons for finding

plaintiff guilty of four major infractions by writing, "Written rpt and testimony, documents provided."

36. Defendant Edwards decided to find plaintiff guilty of four major infractions knowing that he had decided to summarize the reasons for finding plaintiff guilty of four major infractions by writing, "Written rpt and testimony, documents provided."

37. Defendant Edwards to find plaintiff guilty of four major infractions knowing that he had decided to not state who submitted the written report that was used to find plaintiff guilty of four major infractions.

38. Defendant Edwards found plaintiff guilty of four major infractions knowing that he had decided to not submit witness statements to inmate Jirovec and Mrs. Greenway.

39. The decisions of defendant Edwards caused plaintiff to be held in IMU from September 2 through October 7, 1993.

RELIEF

A. continued

40. The actions of defendant Edwards caused plaintiff to be held in IMU from September 2 through October 7, 1993.

41. Defendant Wood decided to refuse to remove the four major infractions from plaintiff's records.

42. Defendant Wood refused to remove the four major infractions from plaintiff's records.

43. Defendant Wood allowed the four major infractions to remain on plaintiff's record.

44. Defendant wood decided to allow the four major infractions to remain on plaintiff's record.

RELIEF

B. Issue an injunction ordering that defendants or their agents:

1. Refrain from violating plaintiff's constitutional rights for the remainder of his stay in the custody of the Washington State Penitentiary.

2. Observe all the due process safeguards in Wolff v. McDonell, 418 U.S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963; Ponte v. Real, 471 US 491, 85 L. Ed. 2d 553, 105 S. Ct. 2192; and Bartholomew v. Watson, 665 F 2d 915 (9th Cir. 1982) when conducting disciplinary hearings.

3. Remove the four major infractions that defendant Edwards found plaintiff guilty of on September 2, 1993 from plaintiff's records and free plaintiff from all residual effects that he might or will endure from his being infracted, pursuant to Hayes v. Thompson, 637 F 2d 483 (7th Cir. 1980).

RELIEF

C. Grant compensatory damages to the plaintiff in the following amounts, to be proven at trial, but in no event less than:

1. $36,000.00 against defendant Gary Edwards.

2. $4,000.00 against defendant Tana Wood.

D. Grant punitive damages to plaintiff in the following amounts, to be proven at trial, but in no event less than:

1. $ 36,000.00 against defendant Gary Edwards.

2. $4,000.00 against defendant Tana Wood.

E. Grant costs to plaintiff to be proven at trial.

F. Grant other and further relief as it may appear this Court deems to be just and equitable for plaintiff to receive.

/s/ Jerry B. Balisok 12/5/93
JERRY B. BALISOK
PLAINTIFF PRO SE

PLAINTIFF'S ADDRESS:
JERRY B. BALISOK-964334
WASHINGTON STATE
PENITENTIARY
PO BOX 520
WALLA WALLA, WA

[FILED]
[October 28, 1994]

APPENDIX I

Thomas H. Speedy Rice
Kristine Balogh
University Legal Assistance
1220 N. Dakota Street
P.O. Box 3528
Spokane, WA 99220-3528
(509) 484-6091

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-93-416-JLQ

PLAINTIFF'S AMENDED COMPLAINT
AND DEMAND FOR JURY TRIAL

JERRY B. BALISOK,

Plaintiff,

vs.

GARY EDWARDS, et al.,

Defendants.

I. NATURE OF THE CLAIM

1. Plaintiff, Jerry B. Balisok, files this Amended Complaint as a matter of right pursuant to Federal Rule of Civil

Procedure 15. Plaintiff, a Washington State prison inmate, alleges Defendants, Gary Edwards and Tana Wood, used procedures to impose disciplinary action which violated his constitutional right to due process. Plaintiff is requesting relief be granted pursuant to 42 U.S.C. § 1983, in the form of monetary damages and injunctive relief.

II. JURISDICTION

2. The District Court has jurisdiction of Balisok's claim based on 28 U.S.C. § 1331, because he alleges Defendants violated the due process clause of the Fourteenth Amendment to the United States Constitution.

III. VENUE

3. The proper venue for Plaintiff's claim is the Eastern District of Washington because all the events and omissions mentioned in this Amended Complaint occurred in the Washington State Penitentiary, in Walla Walla, Washington.

IV. PARTIES

4. During the time of the allegations made herein, Plaintiff, Jerry B. Balisok was imprisoned under the status of a pretrial detainee at the Washington State Penitentiary, in Walla Walla, Washington.

5. During the time of the allegations made herein, Defendant Gary Edwards was the Lieutenant assigned to be in charge of major infractions at Washington at Washington State

Penitentiary, in Walla Walla, Washington.

6. During the time of the allegations made herein, Defendant Tana Wood was Superintendent at Washington State Penitentiary, in Walla Walla, Washington.

V. FACTUAL ALLEGATIONS

7. On or about August 4, 1993, Plaintiff Balisok, was placed in administrative segregation due to an allegation that Balisok committed prison infractions.

8. On or about August 16, 1993, an Infraction Report charged Balisok with the following infractions: (1)extortion, blackmail; (2) threatening another; (3) attempting to have an innocent person proceeded against by lying to staff; and (4) theft, possession of stolen property. (Ex. 1, Copy of Infraction Reports.)

9. Balisok remained in segregation until about August 18, 1993, when he was moved from segregation to the isolation unit.

10. On or about August 18 1993, Balisok received notice that a disciplinary hearing would be conducted regarding the infractions. The hearing was held on or about September 2, 1993.

11. On or about August 18, 1993, Balisok asked Defendant Edwards to obtain a witness statement from inmate John (Jack) Stein.

12. At the hearing on or about September 2, 1993, Balisok requested that Defendant Edwards read Stein's witness statement into the record.

13. Defendant Edwards replied that Stein never submitted a witness statement regarding the chargers against Balisok.

14. However, Stein did prepare and submit a witness statement. When Balisok was released from isolation on October 7, 1993, he reviewed his central file and found Stein's witness statement which was dated August 19, 1993, in Stein's handwriting.

15. There was no date stamped into Stein's witness statement indicating it had been received by the officer.

16. It is general practice at the correctional institution to collect witness statements and stamp the statements with the date it was received.

17. The prison officials at the correctional institution do not date stamp witness statements which are made in reference to a "jail house attorney".

18. The prison officials do not stamp the statements so that in the event of a due process challenge for failure to call witnesses, a prison official may counter the challenge by saying the witness report was not submitted or was submitted late.

19. At no time has Defendant Edwards provided any reason why he denied Balisok access to Stein's witness statement, denied its existence, or refused to date stamp the statement.

20. Stein's witness statement was not stamped because Balisok is a known "jail house attorney".

21. On or about October 25, 1993, Defendant Edwards asked Balisok if he wanted any additional witness statements taken.

22. In response, Balisok requested Defendant Edwards deliver written statements to inmates Charles Harris and Sherman Pulley.

23. Additionally, Balisok requested Edwards write down some specific questions Balisok wanted inmates Harris and Pulley to answer.

24. Defendant Edwards told Balisok the specific questions would be written down at the hearing scheduled for September 2, 1993.

25. At the hearing, on or about September 2, 1993, Balisok requested Defendant Edwards take specific questions to inmates Harris and Pulley.

26. In response, Defendant Edwards stated Harris and Pulley did not return the witness statements.

27. Balisok's questions were not written down or even submitted to inmates Harris and Pulley as requested by Balisok.

28. Witness statements for Harris and Pulley were found in Balisok's central file during the review on or about October 7, 1993, in contradiction to Defendant Edwards statement.

29. Defendant Edwards has not provided any reason for denying Balisok access to Harris and Pulley's statements.

30. On September 2, 1993, Defendant Edwards found Balisok guilty of all four infractions of which Balisok was charged and was sentenced to 10 days isolation, 20 days segregation and lost 30 days good time credit.

31. On Form D, page 1 of 3, of the Disciplinary Minutes and Findings, Defendant Edwards stated the reason for the finding of guilt as "written rpt. and testimony, documents provided." (Ex. 2, Disciplinary Minutes and Findings, pg. 1).

32. Nowhere in Form D did Defendant Edwards specify the name of the witness who provided the testimony or statement which supported the finding of guilt, nor did he state which report provided support for the finding of guilt.

33. Nowhere in Form D did Defendant Edwards specify the substance of the witness statements, written report or testimony which provided the reason for the finding of guilt.

34. Defendant Edwards has never provided Balisok with a verbal or written statement which specifies the facts or

circumstances which supported the finding that Balisok was guilty of the four infractions.

35. Defendant Edwards did not provide an explanation in the Disciplinary Findings as to why he chose to do the following:

(a) why Defendant Edwards did not allow Balisok to access certain witness statements;

(b) why Defendant Edwards denied the existence of certain witness statements; or

(c) why Defendant Edwards refused to date stamp all witness statements made in reference to Balisok.

36. On or about September 2, 1993, Balisok appealed the Edwards findings from the disciplinary hearing. He submitted an eight page appeal to a Correctional Officer to be sent to the Superintendent, Tana Wood.

37. Balisok's eight page appeal was return to him with a letter stating the appeal was too long. Balisok was also given an appeal instruction sheet which stated that an appeal "should" be two pages in length.

38. On or about September 3, 1993, Balisok returned his eight page appeal. He accompanied the appeal with a note arguing there was no requirement that an appeal be two pages since the appeal instruction stating the appeal "should" be two pages was merely suggestive, not mandatory.

39. On or about September 18, 1993, Balisok filed a grievance report alleging his sanction was about to be imposed while his appeal was still being considered. In addition, he alleged he had not received adequate notice as to when his sanction would begin.

40. In response to the grievance, Defendant Edwards determined that Balisok's note arguing the appeal need not be two pages was not a resubmission of his appeal.

41. Defendant Edwards summarily replied to Balisok's grievance that he had submitted an eight page appeal, it was rejected and Balisok never resubmitted an appeal.

42. Balisok's central file contains the eight page appeal, the letter stating the appeal was too long, and Balisok's note resubmitting the appeal and alleging the appeal was not too long.

43. On or about October 19, 1993, Balisok wrote Superintendent Tana Wood, requesting the infraction appeal be reconsidered. This letter explained Balisok had in fact resubmitted his appeal and that witness statements had been withheld at his disciplinary hearing.

44. On or about October 29, 1993, Defendant Wood responded in a Superintendent Memorandum. The memorandum stated Edward's disciplinary ruling and sanctions would stand.

45. Defendant Wood did not provide the explanation for denying Balisok's request for reconsideration.

VI. PLAINTIFF'S CLAIMS FOR RELIEF

Plaintiff herein incorporates and reallege, as though set forth herein, Paragraphs 1 through Paragraph 51.

46. Defendant Edwards, acting in his individual capacity as Lieutenant assigned to be in charge of major infractions at Washington State Penitentiary, at Walla Walla, Washington, under the color of state law, failed to follow the proper disciplinary hearing procedures to accept and deny an inmate's request to call witnesses which are in violation of due process.

47. Defendant Edwards, acting in his individual capacity as Lieutenant assigned to be in charge of major infractions at Washington State Penitentiary, at Walla Walla, Washington, under color of state law, failed to follow the proper procedures to document the disciplinary hearing findings which violated Balisok's due process rights.

48. Defendant Edwards, acting in his individual capacity as Lieutenant assigned to be in charge of major infractions at Washington State Penitentiary, at Walla Walla Washington, under color of state law, failed to follow the proper procedures to document the reason Plaintiff's request to appeal the disciplinary action which violated Balisok's due process rights.

49. Defendant Wood, acting in her independent capacity as Superintendent at Washington State Penitentiary, at Walla Walla Washington, under color of state law, failed to follow the

proper procedures to document the reason Plaintiff's request to appeal the disciplinary action which violated Balisok's due process rights.

WHEREFORE, Plaintiff Balisok seeks the following relief and damages:

1. declaratory relief stating the procedures used by Defendant Edwards and Wood violated Plaintiff Balisok's constitutional right to due process;

2. injunctive relief to prevent the constitutional violations from occurring in the future in the form of an order requiring prison officials to fully and fairly follow the procedures established for these types of hearings and further, to require the prison officials to date stamp all documents, including witness statements, at the time and date first received by prison officials;

3. compensatory and punitive damages for the harm sustained from the use of unconstitutional procedures; and

4. any other relief the Court deems equitable and just.

Dated this 28th day of October, 1994.

UNIVERSITY LEGAL ASSISTANCE

/s/ Speedy Rice
Thomas H. Speedy Rice
Attorney for Plaintiff

/s/ Kristine Balogh
Kristine Balogh
Legal Intern for Plaintiff

[FILED]
[January 19, 1995]

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-93-416-JLQ

ORDER FOR
INTERLINEATION

JERRY B. BALISOK,

Plaintiff,

vs.

GARY EDWARDS, et al.,

Defendants.

This Court grants Plaintiff's Request for Interlineation and orders the Clerk of the Court to make the following interlineations:

(a) in Plaintiff's Amended Complaint and Demand for Jury Trial, p. 4, L 8, cross out "October" and interlineate "August";

(b) in Plaintiff's Amended Complaint and Demand for Jury Trial, p. 8, L 9, cross out "independent" and interlineate "individual"; and

(c) in Plaintiff's Memorandum in Response to Defendant's Motion to Dismiss and Request for Hearing, p. 4, L 8, cross out "Balisok" and interlineate "Defendant Edwards".

DATED this 16th day of January, 1995.

/s/Justin L. Quackenbush
United States District Judge

APPENDIX K

DEPARTMENT OF CORRECTIONS FORM B

INFRACTION REPORT

WASHINGTON STATE PENITENTIARY
INSTITUTION

08/20/93 Attached Unit 4 D 14

OFFICER'S REPORT

Name: BALISOK, JERRY DOC # 964334
DATE: 08/16/83 [Monday]

NUMBER OF RULE VIOLATED:
503 extortion, blackmail
506 threatening another
552 attempting/causing innocent person proceeded against by lying to staff
555 theft/possession of stolen property

TIME: 0900 hours approx

PLACE: Education

DETAILS IN FULL: On 8/16/93 an investigation into alleged misconduct in the Education Department by I/M Balisok 962334 was concluded. It was determined I/M Balisok did attempt to black mail I/M Adams 287645 into lying about an innocent person. He Threatened I/M Adams by stating he would circulate letters through the inmate population that revea! I/M Adams as an "informant" subjecting him to harm. I/M Balisok attempted to cause an innocent person to be proceeded against by lying to Ms. Greenway about her teacher's aid. I/M Balisok did steal copies of letters from I/M Adams.

WITNESSES:

/s/ CUS Ken Jurgensen
OFFICER'S SIGNATURE

Was inmate informed of right to remain silent? yes

Did inmate make statement after being informed of his/her rights? yes

If so, what?

I provided three sheets of paper for my defense, given to Ad-seg not returned yet. Was tutoring Adams at the request of Ms Greeway - I agreed I helped Adams and he was to help me with my legal work in the spring - The Information on Adams Being A snitch was openly discussed in front of a class - (Balisok) I believe Adams is trying to get to McNeal Island - Meeting Between Adam & Balisok in the dining hall did occur.

8-20-93
DATE

ACTION

PLEA: ■ NOT GUILTY □ GUILTY

FOUND: □ NOT GUILTY ■ GUILTY

REASON: Written Report - Investigation documents - Testimony - I Believe CUS Jurgensen's Investigation is correct.

SANCTION: (1) 10 days Iso
(2) 20 days Seg
(3) Loss of 30 days G.T.

/s/ G. S. Edwards
Lt. T. D. Gleason
HEARING OFFICER

/s/ R. Van Boening
for TANA WOOD
SUPERINTENDENT

■ WILL APPEAL □ NO APPEAL
no appeal received

APPENDIX L

DEPARTMENT OF CORRECTIONS FORM D
DIVISION OF PRISONS

DISCIPLINARY HEARING MINUTES AND FINDINGS

INMATE NAME (LAST, FIRST): Balisok, Jerry
DOC NUMBER: 964334
DATE OF HEARING: 8-20-93
TIME OF HEARING: 1:10 p.m.
INFRACTION DATE: 8-16-93
WAIVED 24 HOURS NOTICE: ☐ YES ☒ NO
WAIVED APPEARANCE: ☐ YES ☒ NO

INMATE'S PLEA: GUILTY ___, ___, ___, ___
NOT GUILTY 503, 506, 552, 555

INTERPRETER: ☐ YES ☒ NO
NAME: _____

STAFF ADVISOR: ☐ YES ☒ NO
NAME: _____

COMPETENCY CONCERN: ☐ YES ☒ NO

HEARING IMPAIRED: ☐ YES ☒ NO

SUMMARY OF TESTIMONY (LIST WITNESSES TESTIFYING)/EVIDENCEUSED/FINDINGS/REASONSFOR CONTINUANCES, DECISIONS AND SANCTIONS/ANY RELEVANT INFORMATION: I gave 3 sheets of paper (hand written) to the Adseg Comm. this morning. I was told the papers would be returned to me before this hearing, but I haven't received them yet. These papers constitute 4 hours of work. Mr. Adams and I did not have any agreement. I tutored Adams at Ms. Greeway's request with [continued on page L-3]

LIST EACH WAC 137-28 RULE VIOLATION SEPARATELY:

INFRACTION NO. 503
FOUND: GUILTY ☐ NOT GUILTY ☐
REASON: written rpt. and testimony,

INFRACTION NO. 506
FOUND: GUILTY ☐ NOT GUILTY ☐
REASON: documents provided

INFRACTION NO. 552
FOUND: GUILTY ☐ NOT GUILTY ☐
REASON:

INFRACTION NO. 555
FOUND: GUILTY ☐ NOT GUILTY ☐
REASON:

SANCTION(S): 10 days iso, 20 days seg, loss 30 days good time

REASON(S):

I HAVE RECEIVED A COPY OF THIS FORM
in restraints
INMATE OR STAFF WITNESS SIGNATURE

APPEAL? ■ YES ☐ NO

/s/ G. L. Edwards
HEARING OFFICER SIGNATURE

DATE: 9-2-93

DEPARTMENT OF CORRECTIONS FORM D
DIVISION OF PRISONS

DISCIPLINARY HEARING MINUTES AND FINDINGS
(continued)

INMATE NAME (LAST FIRST): Balisok, Jerry
DOC NUMBER: 964334
DATE OF HEARING: 8-20-93
PAGE 2 of 3

SUMMARY OF TESTIMONY (LIST WITNESSES TESTIFYING)/EVIDENCE USED/ FINDINGS/REASONS FOR CONTINUANCES, DECISIONS AND SANCTIONS/ANY RELEVANT INFORMATION: business math; this started last spring. I helped John with Accting during the spring qtr. so he could pass his test. He agreed to help me with my legal work. The 7/25 letter is different than the one John showed me in the library. I never took anything from him. Adams has a reputation for being the best jailhouse lawyer here. Adams needed help with his accounting class, I needed help with my legal work. I'm the smartest guy on the school floor. We go to the legal library and school together. Sometimes we see each other in the chow hall. Adams wants to sue Ms. Greenway for putting a snitch jacket on him. John told me he took the answers to the accting test off Ms. Greenways desk, but told her I gave him the answers. I never tried to black mail him, and I didn't threaten him. This was a set up.

9-2-93: Witness statements from inmates Pulley & Harris not received CUS Jurgensen's statement received. I didn't steal anything. John Adams is setting me up. I'm a pre-trial detainee - I have special rights - I'm not to be punished. My case was remanded. Adams wants to be transferred to McNeil. Adams told Jurgensen no meeting occurred between Pulley, Harris

DEPARTMENT OF CORRECTIONS FORM D
DIVISION OF PRISONS

DISCIPLINARY HEARING MINUTES AND FINDINGS
(continued)

INMATE NAME (LAST FIRST): Balisok, Jerry
DOC NUMBER: 964334
DATE OF HEARING: 9-2-93
PAGE 3 OF 3

SUMMARY OF TESTIMONY (LIST WITNESSES TESTIFYING)/EVIDENCE USED/FINDING/REASONS FOR CONTINUANCES, DECISIONS AND SANCTIONS/ANY RELEVANT INFORMATION:

and me in the dining hall.

APPENDIX M

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-35484

D.C. No. CV-93-00120-FVS

OPINION

Norman Gotcher, Jr.,
Plaintiff-Appellant,

v.

TANA WOOD, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Washington
Fred L. Van Sickle, District Judge, Presiding

Argued and Submitted
August 10, 1995--Seattle, Washington

Filed October 4, 1995

Before: Robert R. Beezer and Michael Daly Hawkins,
Circuit Judges, and Dickran M. Tevrizian,* District Judge

Opinion by Judge Hawkins

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*The Honorable Dickran M. Tevrizian, United States District Judge for the Central District of California, sitting by designation.

SUMMARY

Individual Rights/Civil Rights

The court of appeals reversed a district court judgment and remanded. The court held that the district court erred in dismissing a Washington state prisoner's claim that loss of "good conduct time credits" constituted a compensable violation of his due process rights.

Pursuant to Washington's Sentencing Reform Act, inmates who do not commit serious infractions are entitled to good conduct time credits. Appellant Norman Gotcher, Jr., who is incarcerated in Washington State, was found guilty of serious infractions of a prison disciplinary code. As a result, he lost 30 days of good conduct time credits and was placed in disciplinary segregation.

Gotcher filed a civil rights action against appellee Superintendent of the Washington State Penitentiary Tana Wood and others (collectively, Wood). He alleged that, with regard to the disciplinary hearings on the infractions, Washington Department of Corrections (DOC) employees failed to give him proper notice of allegations and did not allow him to call witnesses or present documentary evidence. The district court granted Wood's motion to dismiss, concluding that Gotcher did

not possess a protectable liberty interest. The court applied the "mandatory language/substantive predicate" due process analysis set forth in earlier Supreme Court opinions. Gotcher appealed.

[1] Gotcher's case did not call into question the lawfulness of his continuing confinement. His case involved a claim for using the wrong procedure, not for reaching the wrong result.

[2] The Court has abandoned the "mandatory language/substantive predicate" analysis and revised the relevant due process analysis. **[3]** For purposes of that analysis, the scheme of the good conduct time credit system in Washington appeared to be indistinguishable from a good conduct time credit system which the Court, in *Wolff v. McDonnell*, found to confer a liberty interest on inmates. **[4]** Despite the fact that the DOC issued a "Policy" stating that it was not its intent to create a liberty interest, **[5]** this case fell squarely under *Wolff* with regard to whether Gotcher possessed a liberty interest in accumulating good time credits. Accordingly, the district court's ruling was reversed.

[6] The record was insufficient for a determination of whether the disciplinary segregation at issue in this case imposed an "atypical and significant hardship" on Gotcher "in relation to the ordinary incidents of prison life." Thus, remand was warranted on Gotcher's claim regarding disciplinary segregation.

COUNSEL

John Midgley, Evergreen Legal Services, Seattle, Washington, for the plaintiff-appellant.

Talis M. Abolins, Assistant Attorney General, Olympia, Washington, for the defendants-appellees.

OPINION

HAWKINS, Circuit Judge:

Appellant Norman Gotcher ("Gotcher") appeals the district court's dismissal of his civil rights action against Tana Wood, the Superintendent of the Washington State Penitentiary, and others (collectively "Wood"). Gotcher's appeal presents two issues: (1) does Gotcher possess a due process liberty interest in the accrual of good conduct time, and (2) does he possess a due process liberty interest in remaining free from disciplinary segregation. The district court concluded that he possessed neither and dismissed his complaint. We have jurisdiction pursuant to 28 U.S.C. § 1291. Because we believe the district court's dismissal of Gotcher's action was inappropriate we reverse and remand the matter to the district court.

I.

Gotcher is incarcerated in Washington State, where he is serving a sentence for burglary. He alleges in his complaint that

he was charged twice in 1992 with "serious infractions" of his prison's disciplinary code. Specifically, he was charged with "[t]hreatening another with bodily harm or with an offense against his/her person." *See* Wash. Admin. Code (WAC) § 137-28-030(506). He alleges that, with regard to the disciplinary hearings on these infractions, Washington Department of Correction (DOC) employees, among other things, failed to give him 24-hour advanced written notice of allegations against him and did not allow him to call witnesses or present documentary evidence in his defense.

Gotcher was found guilty of the serious infractions at the disciplinary hearings. As a consequence, he lost 30 days of good conduct time credits and was placed in disciplinary segregation.

This action, brought under 42 U.S.C. § 1983, followed. Among other claims, Gotcher alleges that the DOC staff failed to afford him the process he was due in connection with the disciplinary hearings. Accordingly, he claims that his loss of good conduct time credits and his disciplinary segregation constituted compensable violations of his due process rights.

Wood filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), arguing that because Washington prison inmates do not possess a liberty interest in remaining free from disciplinary action, the complaint failed to state a claim

upon which relief could be granted. In granting the motion to dismiss, the district court noted that because the Due Process Clause of the Fourteenth Amendment does not give rise to liberty interests in good conduct time credits or in remaining within the general prison population, the source of Gotcher's claimed liberty interest had to be Washington state law. Applying the "mandatory language/substantive predicate" due process analysis set forth in such Supreme Court opinions as *Hewitt v. Helms*, 459 U.S. 460 (1983), and *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454 (1989), the district court concluded that Gotcher did not possess a protectable liberty interest. The court therefore dismissed his complaint. Gotcher timely appealed that decision.

We review de novo a dismissal for failure to state a claim, as it is a ruling on a question of law. *Everett & Jennings, Inc. v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). All allegations of fact must be taken as true and construed in the light most favorable to Gotcher. *See id.* at 229. We will not affirm such a dismissal unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Id.*

II.

As a threshold matter, Wood argues that the Supreme Court's recent decision in *Heck v. Humphrey*, 114 S. Ct. 2364

(1994), bars Gotcher's claim. In *Heck*, the Court held that, when this type of claim, if successful, will *necessarily* require a federal court to determine the constitutional validity of the inmate's continuing confinement, the claim is not cognizable until the plaintiff's sentence or conviction has already been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 2372.

[1] Wood argues that, because Gotcher challenges the disciplinary procedure which resulted in the loss of his good conduct time credits, his claim is governed by *Heck* because, if successful, it might affect the duration of his confinement. Wood's reliance on *Heck*, however, is misplaced. Gotcher's good conduct time credit claim is similar to the claim in *Wolff v. McDonnell*, 418 U.S. 539 (1974). In *Heck*, the Court expressly distinguished *Wolff*, noting that *Wolff* challenged the *procedure* by which the inmate was denied good-time credits. *Wolff*, like this case, involved a claim for using the wrong procedure, not for reaching the wrong result (i.e., the denial of good time credits). *See Heck*, 114 S. Ct. at 2370. "Nor is there any indication in the [*Wolff*] opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in *Wolff* did *not* call

into question the lawfulness of the plaintiff's continuing confinement." *Id.* Likewise, Gotcher's case does not call into question the lawfulness of his continuing confinement and is not barred by *Heck*.

III.

We first address Gotcher's claimed liberty interest in receiving good conduct time credit. Pursuant to Washington's Sentencing Reform Act (SRA), inmates can earn an early release date through an earned early release program comprised of "earned time," *see* WAC § 137-28-006(5), and "good conduct time credits," *see* WAC § 137-28-006(6). "Good conduct time credits," which are at issue here, are defined as that portion of an inmate's potential sentence reduction gained by not receiving a "serious infraction." WAC § 137-28-006(6); *see also* DOC Policy No. 350.130 (defining "Good Conduct Time" as "[t]hat portion of time which an offender is eligible to earn by behaving pro-socially, i.e. not receiving serious infractions"). Thus, inmates who do not commit serious infractions are entitled to good conduct time credits, which can constitute 10 days of credit for every 30 days served. *See* DOC Policy No. 350.130.

These provisions were developed in response to Revised Code of Washington (RCW) § 72.09.130, which provides that the DOC "shall adopt" a system providing incentives for good conduct. Pursuant to RCW § 72.09.130, the good conduct time

credit program "shall be fair, measurable, and understandable to offenders, staff, and the public."

[2] Applying the "mandatory language/substantive predicate" due process analysis of *Helm* and *Thompson* to these facts, the district court held that Gotcher did not have a protectable liberty interest in the accrual of good conduct time credits. The Supreme Court, however, has since abandoned the "mandatory language/substantive predicate" analysis. *See Sandin v. Conner*, 115 S. Ct. 2293 (1995). Calling for a "return to the due process principles . . . correctly established and applied" in *Wolff v. McDonnell*, 418 U.S. 558 (1974), and *Meachum v. Fano*, 427 U.S. 215 (1976), the Court revised the due process analysis to be applied in prisoner § 1983 actions.

> Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

115 S. Ct. at 2300.

[3] For purposes of our due process analysis, the scheme of the good conduct time credit system in Washington appears to be indistinguishable from Nebraska's good conduct time credit system, which the Supreme Court in *Wolff v.*

McDonnell found to confer a liberty interest on inmates. *See* 418 U.S. at 557. As the Court held in *Wolff*.

> It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison. But here the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska may have the authority to create, or not, a right to a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing in "every conceivable case of government impairment of private interest." But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment "liberty" to entitle him to those minimal procedures appropriate under the circumstances and required by the Due Process Clause to insure that that state-created right is not arbitrarily abrogated.

Id. (citations omitted).

[4] One apparent distinction between this case and *Wolff*, however, is that the Washington DOC has issued a "Policy" stating that

> [i]t is the purpose of Department policy to guide the Department personnel in the conduct and performance of their duties. It is not the intent to grant offenders under the jurisdiction of the Department by policy a state-created liberty interest in addition to those rights guaranteed to offenders under the United States Constitution.

DOC Policy 100.100, at 1.

This DOC policy directive, however, is not controlling. As *Wolff* indicates, the focus is whether the State has created a right of "real substance." If it has done so, the State cannot then emasculate that right merely by issuing the disclaimer that it was not its intent to create a liberty interest. Moreover, the disclaimer in a DOC policy statement does not override the provisions of the Washington Administrative Code. And as the WAC states with regard to prison disciplinary procedures, its purpose is to "provide a standardized system consistent with constitutional due process for ascertaining whether [prisoner] misconduct" has occurred. WAC § 137-28-005(1).

[5] Thus, with regard to whether Gotcher possesses a liberty interest in accumulating good time credits, this case falls squarely under *Wolff*, which the Supreme Court noted in *Sandin* "correctly established and applied" due process principles in the prisoner liberty interest context. *See* 115 S. Ct. at 2300. Because the district court's ruling conflicts with *Wolff*, we reverse that ruling.

IV.

We next address Gotcher's claimed liberty interest in remaining free from disciplinary segregation. In *Sandin v. Conner*, the Supreme Court determined that a Hawaii inmate did not have a liberty interest in remaining free from disciplinary segregation because the inmate's 30 days in segregated

disciplinary confinement "did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." 115 S. Ct. at 2301. The Court reached this conclusion after reviewing the record (the district court proceeding was resolved by summary judgment) and finding that, "with insignificant exceptions," the inmate's disciplinary segregation "mirrored those conditions imposed upon inmates in administrative and protective custody." *Id.* The Court supported this conclusion by discussing the various custodial conditions at the particular prison in question and by demonstrating that the plaintiff's segregation "did not work a major disruption in his environment." *Id.*

[6] In contrast to the detailed record in *Sandin*, the record in this appeal is insufficient for a determination of whether the disciplinary segregation at issue imposed an "atypical and significant hardship on Gotcher in relation to the ordinary incidents of prison life." *Sandin*, 115 S. Ct. at 2300. Because we will not affirm a dismissal under Fed. R. Civ. P. 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief, *Everett & Jennings, Inc.*, 23 F.3d at 228, we reverse the district court on its dismissal of Gotcher's claim with regard to disciplinary segregation, and we remand for further proceedings.

V.

For the foregoing reasons, we REVERSE the district court's dismissal and REMAND for further proceedings.